FILE COPY

FILED
APR 17 1959
JAMES R. BROWNING, Clerk

Nos. 435-436-437

In the Supreme Court of the United States

OCTOBER TERM, 1958

HARRY LEV, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND WOOL, PETITIONER

v.

UNITED STATES OF AMERICA

MARVIN RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA P. COOPER,
JEROME M. FEIT,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement	6
A. The government's evidence in general	7
B. The Carlin testimony	15
Summary of argument	19
Argument:	
Introduction	23
I. By 18 U.S.C. 3500, Congress excluded summaries of prior oral statements from production for purposes of impeachment of a witness. The judgment that this was desirable procedure was within the constitutional power of the Congress	30
A. The purpose of Congress in enacting 18 U.S.C. 3500 was to permit a witness to be impeached by his own statements, but not by memoranda of other persons purporting to summarize what the witness said	30
1. The statutory language	30
2. The background and general purpose of 18 U.S.C. 3500	31
3. The legislative purpose in excluding summaries neither signed nor adopted by the witness	40
B. The congressional judgment that a witness should not be impeached by a statement which is not his own is a rational one, consistent with the requirements of due process	49

Argument—Continued
I. By 18 U.S.C. 3500, etc.—Continued
B. The congressional judgment, etc.—Continued
. The statutory distinction between summaries prepared by an investigator, unverified by the witness, and the witness' own extra-judicial statements has a rational basis in experience ..... Page 50
2. The distinction finds support in the *Jencks* decision itself 56
3. To permit production of summaries would create difficult trial problems in relation to matters collateral to the main issues of the case and make for confusion and delay 58
II. The Court of Appeals properly considered the nature of the document in determining whether it should reverse and order a new trial 61
III. Denial of the request for production would not have been error under *Jencks* v. *United States*, 353 U.S. 657 68
IV. Any possible error in failing to order production of the summary of Carlin's interview had no effect whatever as to Wool and Lev and was harmless as to Rubin 70
A. Carlin did not implicate Wool and Lev, and the substance of his testimony as to Rubin was conclusively established by independent evidence, including Rubin's own testimony 70
B. The rule of harmless error applies, in proper cases, to a failure to produce statements or reports of a witness 77
C. The ruling as to Carlin's testimony did not permeate the trial 80
Conclusion 84

CITATION

Cases:

	Page
Alford v. *United States*, 282 U.S. 687	59
American Book Company v. *Kansas*, 193 U.S. 49	62
Beazell v. *Ohio*, 269 U.S. 167	66
Bergman v. *United States*, 253 F. 2d 933	65, 78
Communist Party of the United States v. *Subversive Activities Control Board*, 254 F. 2d 178	22, 54
Coulston v. *United States*, 51 F. 2d 178	61
Doremus v. *Board of Education*, 342 U.S. 429	62
Duncan v. *Missouri*, 152 U.S. 377	67
Ewing v. *United States*, 135 F. 2d 633, certiorari denied, 318 U.S. 776	61
Galax Mirror Company v. *United States*, No. 491, this Term	29–30
Gibson v. *Mississippi*, 162 U.S. 565	67
Gordon v. *United States*, 344 U.S. 414	50, 55
Harris v. *United States*, 261 F. 2d 792	78
Hawkins v. *United States*, 358 U.S. 74	50
Hickman v. *Taylor*, 329 U.S. 495	57, 59
Hopt v. *Utah*, 110 U.S. 574	25, 67
Jencks v. *United States*, 353 U.S. 657	3, 18, 19, 22, 24, 25, 26, 28, 30, 31, 32–34, 35–36, 45, 56, 57, 65, 68–69, 77–78.
Kimball v. *Kimball*, 174 U.S. 158	62
Kotteakos v. *United States*, 328 U.S. 750	79
Kring v. *Missouri*, 107 U.S. 221	66
Lohman v. *United States*, 251 F. 2d 951	65
Lutwak v. *United States*, 344 U.S. 604	49
Mallett v. *North Carolina*, 181 U.S. 589	67
Michelson v. *United States*, 335 U.S. 469	60
Mills v. *Green*, 159 U.S. 651	62
New York Life Insurance Co. v. *Taylor*, 147 F. 2d 297	22, 52–54
Padron v. *United States*, 254 F. 2d 574, certiorari denied, 358 U.S. 815	78
Palermo v. *United States*, No. 471, this Term	29
Palmer v. *Hoffman*, 318 U.S. 109	22, 51–52
Papworth v. *United States*, 256 F. 2d 125, certiorari denied, 358 U.S. 854	54
Pittsburgh Plate Glass Company v. *United States*, No. 489, this Term	29–30

Cases—Continued

	Page
Pulitzan Co. v. *Hall*, 55 F. 2d 139	61
Rosenberg v. *United States*, No. 451, this Term	24, 29, 30, 35, 49, 64
Scales v. *United States*, No. 488, this Term	29, 67
Simon v. *United States*, 123 F. 2d 80, certiorari denied, 314 U.S. 694	61
Simms v. *United States*, 248 F. 2d 626, certiorari denied *sub nom. Duncan* v. *United States*, 355 U.S. 875	78
Thompson v. *Missouri*, 171 U.S. 380	24, 66, 67
Tot v. *United States*, 319 U.S. 463	49
United States v. *Anderson*, 154 F. Supp. 374	37, 47, 55
United States v. *Angelet*, 255 F. 2d 383	65
United States v. *Beekman*, 155 F. 2d 580	35
United States v. *Benson*, 20 F.R.D. 602	55
United States v. *Alvin Clark*, W.D. Pa	36
United States v. *Cohen*, 145 F. 2d 82, certiorari denied, 323 U.S. 799–800	81
United States v. *Ebeling*, 146 F. 2d 254	35, 81
United States v. *Gandia*, 255 F. 2d 454	65
United States v. *Grayson*, 166 F. 2d 863	35
United States v. *Grunewald*, 162 F. Supp. 621	54–55
United States v. *Ernest Hall*, 153 F. Supp. 661	37
United States v. *Johnson*, 319 U.S. 302	62
United States v. *Krulewitch*, 145 F. 2d 76	35, 81
United States v. *George Allen Leonard* (N.D. Ga.)	36
United States v. *Miller*, 248 F. 2d 165, certiorari denied, 355 U.S. 905	62, 65, 78
United State v. *Palermo*, 258 F. 2d 397, No. 471, this Term, pending on writ of certiorari	54
United States v. *Papworth*, 156 F. Supp. 842, affirmed, 256 F. 2d 125, certiorari denied, 358 U.S. 854	65
United States v. *Prince*, C.A. 3, No. 12,785, decided March 18, 1959	79
United States v. *Rosenberg*, 257 F. 2d 760, pending on writ of certiorari, No. 451, this Term	78
United States v. *Sager*, 49 F. 2d 725	61
United States v. *Sheba Bracelets*, 248 F. 2d 134, certiorari denied, 355 U.S. 904	78
United States v. *Ida A. Stanley* (N.D. Ga.)	36
United States v. *Waldman*, 159 F. Supp. 747	64
Wayman v. *Southard*, 10 Wheat. 1	49

Constitution and statutes:
Constitution of the United States: Page
Art. 3, Sec. 1 ... 49
Statutes:
Federal Business Records Act, 28 U.S.C. (1946 ed.) 695 ... 51-52
18 U.S.C.:
201 ... 6
371 ... 6
18 U.S.C. 3500 (Supp. V) ... 20, 29, 30, 31
(a) ... 4
(b) ... 4
(c) ... 4, 65
(d) ... 5
(e) ... 6, 20
18 U.S.C. 3771 ... 49
Miscellaneous:
103 Cong. Rec.:
15787 ... 41
15791 ... 42
15931 ... 42
15932 ... 43
15934 ... 43
15935 ... 43
15938 ... 37, 43
15939 ... 39
16119 ... 44, 45
16130 ...
16131, 16084 ... 45
16487 ... 47
16488 ... 47
16489 ... 47
16489, 16742 ... 45
16739 ... 47
Federal Rules of Criminal Procedure, Rule 26 ... 49
H.R. 7915, 85th Cong., 1st Sess ... 43
H. Rep. No. 1271, 85th Cong., 1st Sess., p. 2 ... 45, 46
H. Rep. No. 700, 85th Cong., 1st Sess.:
P. 2 ... 39
Pp. 5-6 ... 44
S. 2377, 85th Cong., 1st Sess ... 37, 43

Miscellaneous—Continued

	Page
S. Rep. No. 569, 85th Cong., 1st Sess.:	
P. 2	39
Pp. 4–8	38
P. 7	46
P. 10	41
S. Rep. No. 981, 85th Cong., 1st Sess.:	
P. 1	41
P. 2	48
P. 3	39
III Wigmore, *Evidence* (3rd ed. 1940):	
Secs. 1017, 1018	37

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 435

HARRY LEV, PETITIONER

v.

UNITED STATES OF AMERICA

No. 436

RAYMOND WOOL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 437

MARVIN RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 80–86) is reported at 258 F. 2d 9.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1958 (R. 87). On September 9, 1958, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari to and including October 10, 1958 (R. 88–89). The petitions were filed on that date. On December 8, 1958, the petitions were granted in all three cases—Nos. 435 and 436 being granted as to limited questions (R. 90–92). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions on which the Court granted certiorari in Nos. 435 and 436 were phrased by petitioners as follows:

No. 435:

1. Is it proper for a reviewing court to make an examination *in camera* of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of *ex parte* affidavits pertaining to the summary in order to determine whether the summary is discoverable under the provisions of Title 18 U.S.C., Section 3500, wher no claim is made that it contained irrelevant or extraneous matter?

2. Are not summaries and reports of prior statements made by witnesses to a government investigator available to t' e defendant under the provisions of Title 18 U.S.C., Section 3500?

3. Does Title 18 U.S.C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?

No. 436:

4. Whether the rights of the petitioner were substantially prejudiced when the trial court denied the motion of the defendants to direct the Government to produce a statement which a witness for the Government had previously given to government agents, in direct violation of this Court's decision in *Jencks* v. *United States,* 353 U.S. 657.

The Government believes that the questions presented by the three cases may be stated as follows:

1. Whether it was within the constitutional power of Congress to provide, as it has in 18 U.S.C. 3500, that investigators' summaries of prior oral statements of witnesses, not signed, adopted or approved by the latter, are not subject to production for impeachment purposes.

2. Whether the Court of Appeals properly examined a document *in camera* in reaching the conclusion that a new trial should not be ordered since the document was not a statement which could be required to be produced under 18 U.S.C. 3500 at a new trial.

3. Whether it was error, under *Jencks* v. *United States,* 353 U.S. 657, for the trial court to deny the request of one defendant for production of what proved to be the summary of a Senate investigator's interview with a witness, where the document had not been seen or approved by the witness and was not then in the possession of the prosecution.

4. Whether it was reversible error to deny the request for production of the Senate investigator's summary where the testimony of the witness was secondary

and largely admitted by the defendant making the request; where the testimony of the same witness before the Senate Committee was available to the defense and was used for impeachment purposes; and where the guilt of all the defendants was proved by overwhelming evidence from other sources.

STATUTE INVOLVED

18 U.S.C., Supp. V, 3500 provides:

> SECTION 3500. *Demands for production of statements and reports of witnesses.*—(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the wit-

ness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

Count 1 of a three-count indictment, returned in the United States District Court for the Southern District of New York in March 1956, charged petitioners and six others with a conspiracy, in violation of 18 U.S.C. 371, to defraud the United States with respect to the administration and procurement of government contracts. Counts 2 and 3 charged petitioner Rubin with bribery in connection with the contracts, in violation of 18 U.S.C. 201 (R. 12–16). After a lengthy jury trial, petitioners and two co-defendants, Ades and Hort, were convicted under the conspiracy count.[1] Petitioner Rubin was acquitted of bribery under the second count, but convicted under the third (R. 9, 18–19).

Petitioner Lev was sentenced to serve nine months imprisonment and to pay a fine of $5,000; petitioner

[1] One co-defendant entered a plea of guilty and testified as a prosecution witness; one was acquitted. A motion to sever was granted as to two others.

Wool to eighteen months and a fine of $1,500; and petitioner Rubin to fifteen months each on the first and third counts, to run concurrently, and a $1,000 fine on the first count (R. 10, 17, 19). On appeal by petitioners and co-defendant Ades, the convictions were affirmed (R. 86).

A. THE GOVERNMENT'S EVIDENCE IN GENERAL

The cap contract. In 1952, petitioner Rubin was working for a firm for which he had obtained several Navy contracts in return for 33⅓ percent of the company profits (Tr. 410, 1913–1924).[2] In early 1952, he was contacted by the officers of Bonita Originals, Inc., a New York firm manufacturing dresses in Puerto Rico, which had suffered business losses and was interested in obtaining government contracts (Tr. 300, 373, 3089, 3094–3095). Rubin had many meetings with the officers—Ades, the president (and a co-defendant in the action), Levy, the secretary-treasurer, and Carlin, an accountant who had initially suggested that Rubin could get the government contracts Bonita needed (Tr. 314, 406–407, 3095). Rubin told the officers that he would get all the Army contracts they could handle in return for 50 percent of the profits accruing from the work (Tr. 307, 315, 408, 3097). He said that 5 to 7 percent of the face value of the contracts would be needed

[2] In view of the expense which would be involved in reproducing the entire record, petitioners have printed only those portions of the trial transcript dealing with demands for production of a document. Since the government is making an alternative argument of harmless error, we shall refer to facts appearing in the trial transcript ("Tr.") on file with this Court.

for gifts and entertainment for government personnel in order to get the contracts and to avoid any difficulties with the government in the course of their performance (Tr. 312–313, 412). He spoke specifically of his contacts at the New York Quartermaster Procurement Agency (NYQMPA), later known as the Armed Services Textile and Apparel Procurement Agency (ASTAPA), an agency which handled procurement for all of the armed forces until October 1953 (R. 176, 307). Rubin mentioned the names of "Major Farnell", a contracting officer, and "Mella Hort", a clerk in the contract administration branch of the agency (Tr. 314).

Bonita's officers accepted Rubin's proposal when he agreed to take 33⅓ percent, instead of 50 percent, of the profits (Tr. 309, 3100). After Rubin brought them samples of various Army garments, they decided that the company would bid on three contracts for manufacture of the Army garrison cap, that being a relatively simple item which could be made in the company's subsidiary in Puerto Rico (Tr. 414, 415). Rubin, who was to handle the bidding exclusively (Tr. 416–417, 3197), gave repeated assurances that Bonita would receive the contracts (Tr. 416, 420).

In June 1952, Bonita was awarded all or part of the three contracts, which covered the manufacture of over one million garrison caps (Tr. 417, 3198). The award to Bonita of two of these contracts had been recommended by NYQMPA contracting officer Major Eric Farnell, who had supervisory authority over the issuance, review and evaluation of bids, the making of awards, and the administration of con-

tracts (Tr. 157, 163–164, 179–180). The clerk in charge of the administration of the three contracts, subject to Farnell's supervision, was Mella Hort (Tr. 165–166, 190).

After the award, the company president, Ades, took over the management of the plant in Puerto Rico, where the caps were to be made. Levy, the secretary-treasurer, remained in New York with Rubin, who was to be in complete charge of liaison with the procurement agency (Tr. 357, 416, 358–359, 420, 1074, 3197). Almost immediately, Rubin requested money from Levy in order to reward the government personnel who had aided in securing the contracts (Tr. 318, 422–423). Rubin suggested that Levy record the payments in Arabic and that he charge the sums to travel and entertainment on the company's books (Tr. 433). He told Levy that an initial sum of $1,000 which had been turned over to him had been paid to Major Farnell (Tr. 433). In Levy's presence, he gave a $500 payment to an NYQMPA accountant, Poilack, who had likewise recommended the awards (Tr. 157, 165, 426–427, 431). In September 1952, Rubin gave $100 to Mella Hort, which was entered on company books as a $99.70 charge to travel and entertainment (Tr. 439–440). Contemporaneously, Hort prepared a document authorizing the government's acceptance of 37,000 defective hats manufactured by Bonita at a reduction of one cent per hat (Govt. Ex. 8–D; Tr. 111). Thereafter, numerous payments of sums of money, one as high as $1,500, were made to Major Farnell, Mella

Hort, Pollack, and other procurement agency employees (Tr. 496, 499, 521–530, 538).

Petitioner Wool, an Air Force captain, came to work at the agency in September 1952, succeeding Major Farnell as the contracting officer having authority over the Bonita contracts (Tr. 89). In December 1952, Bonita's secretary-treasurer, Levy, recorded in his Arabic notes that Captain Wool had been given $200, upon Rubin's request, because Wool was going to help them in the future (Tr. 504). In November, Wool and Mella Hort, at Rubin's request, changed the delivery schedules to give Bonita more time to complete its contracts without penalty (Govt. Ex. 3–B; Tr. 106). In February 1953, petitioner Wool, Mella Hort and Major Farnell prepared an authorization accepting some 2,000 defective Bonita-made caps at one cent per hat reduction in price (Govt. Ex. 6–B; Tr. 109).

In addition to payments of money, Rubin, using Bonita funds, plied procurement agency employees with gifts. A deep-freeze, large quantities of meat and lingerie went to Porreca, an agency chief inspector who controlled the assignment of all inspectors (Tr. 460, 510–511, 513, 1205, 1227–1233). Porreca, at Rubin's request, transferred a subordinate assigned to the company's Puerto Rican plant and replaced him with a new plant inspector whom Rubin had suggested (Tr. 444–445, 1213–1226). The new plant inspector lived "like a king," rent free, in Ades' house during his three months' inspection duty and "cooperated" fully, even to the point of sending de-

fective caps to Rubin instead of to his superiors (Tr. 1224, 1351–1356).

Rubin, in New York, purchased clothing for Mella Hort and for her children (Tr. 466–470, 1516–1517, 1522). Both she and Wool visited the Bonita offices frequently (Tr. 471, 552, 1135). On one occasion, Wool picked up an overcoat for himself; another time, children's garments which Ades had sent from Puerto Rico (Tr. 471, 550–552).

In June 1953, Bonita paid Wool's medical bills, amounting to some $265 (Tr. 543–545, 1145–1146). On Rubin's instructions, the Bonita secretary omitted the designation "Dr." before the doctor's name on the check and charged the amount, on the company books, to professional fees (Tr. 546, 1087). Rubin told Levy that Bonita should pay the bill because it needed more work and because Wool was trying to get a contract for Bonita which another firm (R. & J.) was performing (Tr. 543–544).

At about this time, Wool and Hort visited the R. & J. firm, threatening it with cancellation of its government contract unless it met its delivery schedules on garrison caps or subcontracted to another company (Tr. 3366–3377, 3587–3588). The firm was forced to subcontract, and Bonita obtained the subcontract (Tr. 167–168). Mrs. Hort told Levy that she and Wool had "worked hard" to get the subcontract for Bonita (Tr. 570–571).

In the summer of 1953, Bonita received its final payment on the garrison cap contract, after having sent to Puerto Rico, at company expense and compensation, a government property specialist who dis-

covered and ironed out discrepancies in inventory (Tr. 1159–1166).

The white hat contract. In December 1952, and again in April 1953, while Bonita was fulfilling its cap contracts, the procurement agency received requests for the purchase of nearly 7 million enlisted men's white sailor hats, and 7 thousand midshipmen's white hats (Tr. 168). An invitation to bid was issued on April 23, 1953 (Tr. 169). Petitioner Wool was assigned as the contracting officer (Tr. 165–166).

Petitioner Rubin learned of the government purchase authorizations, despite their classified nature, long before the invitation to bid was issued (Tr. 571–572, 2059). He discussed with Levy the possibility of Bonita's submitting a bid, but Levy refused because he felt that Bonita was not equipped to handle the work (Tr. 576, 578).

In early April, some three weeks before the invitation to bid had been issued, petitioner Lev, the owner of the Mid-City Uniform Cap Company in Chicago (R. 580), met with Rubin in the home of Mella Hort. They discussed the possibility of bidding on the white hat contract (Tr. 1523–1524). Rubin described to Lev the advantages of manufacturing in Puerto Rico (Tr. 2077–2078).

Several days later, Rubin and Lev met in an automobile a short distance from ASTAPA (Armed Services Textile and Apparel Procurement Agency) headquarters. Lev signed a check for $2,000, made payable to Mrs. Hort's husband (Tr. 1511–1512, 3412–3414). Although the defense later claimed that this check was given as an advance on an unmaterialized resin enter-

prise (Tr. 1520, 3415), Rubin told Levy that Lev had given the check, as well as clothing from Saks Fifth Avenue and cash of $400 or $500, to Mella Hort in connection with the white hat contract. Levy recorded this in his Arabic notes (Tr. 617–620, 663). Both Lev and Hort, in testimony previously recorded before a Senate Committee, had admitted the gift and receipt of the clothing (Tr. 1518–1520, 1522–1523).

After further meetings between Lev and Rubin in Chicago and in New York, it was decided that they would bid on the white hat procurement (Tr. 2083, 2087, 2092–2094). Lev was to receive 51% of the profits; Rubin and Ades (who flew in from Puerto Rico to attend the New York meeting of Lev and Rubin) were to share the remaining 49% (Tr. 594; Govt. Ex. 67, Tr. 2100). Rubin told Levy that he and Ades would bring their profits into Bonita (Tr. 592, 597). He also told Levy that Wool and Hort were assisting them in getting this contract (Tr. 606).

Ades immediately began negotiations with Puerto Rican authorities for an option on some newly constructed government-owned factory buildings (Tr. 1550–1551). He told the authorities that Lev, his new partner, was in the process of receiving an award from the United States Government for the manufacture of Navy hats. This took place before Lev had submitted a bid. Negotiations for the option were completed on May 1, 1953.

Four days later, on May 5, 1953, which was the last day for submitting bids, the Lev group bid for the entire quantity on an all-or-nothing basis (Tr. 169, 2097). Its offer was the lowest bid (Tr. 2096).

ASTAPA ordered a pre-award survey to be made of the Lev facilities in Puerto Rico to determine whether they were adequate (Tr. 1242). Rubin asked Chief Inspector Porreca to expedite the survey (Tr. 1242). Although the survey report revealed that Lev and the others had absolutely no machinery in the plants and no personnel on hand, the report concluded that the facilities were adequate (Govt. Exs. 14–F, 14–H; Tr. 123). Porreca, reviewing the report, told Rubin there might be certain difficulties because of the lack of machinery (Tr. 1244). Rubin assured him that there would be no difficulties because Raymond Wool was assisting, stating, "Ray is one of the boys. What are you worried about?" (Tr. 1244–1245). On May 20, 1953, on Wool's recommendation, the entire contract was awarded to Lev (Tr. 170).

Shortly thereafter, Wool called the Bonita office and spoke to Rubin (Tr. 607–8). Rubin told Levy that Wool was upset because he had received only $1,000 from Lev and that he was supposed to receive $5,000 (Tr. 608–609). Rubin then called Lev and told him that Wool was complaining (Tr. 609). Lev withdrew $8,000 from his Chicago bank (Tr. 1416) and came to New York on June 29, 1953 (Tr. 1193–1194). He met Rubin, Wool and Mrs. Wool at a restaurant where he handed Mrs. Wool $5,000 in cash (Tr. 610–612). Shortly thereafter, the Wools made a $5,900 cash payment on a home (Tr. 1419–1420).

During the same month, Lev requested permission to modify certain packaging requirements imposed by the contract. Wool granted the permission, saving Lev more than $60,000 (Gov't. Exs. 16–A, 16–K; Tr.

79, 138, 171, 1705–1716). Porreca, who had been given $1,000 by Lev, had another (see *supra*, p. 10) "difficult" inspector reassigned at Rubin's request (Tr. 1250–1254). Lev was delinquent in meeting delivery dates, and a substantial number of the hats were defective (Tr. 1573–1578, 1645–1646, 1618–1650, 1816–1819).

B. THE CARLIN TESTIMONY

The demand at the trial. Among the twenty-seven witnesses called by the government was the accountant, Carlin, who explained that he had worked with Bonita for nine months in 1952 (R. 21, 24-25). He identified company books and records, including the general ledger, and an entry in the ledger by which he had posted a thousand dollar check to "Entertainment" (R. 25–37). He identified the check and said that Rubin told him it was for expenses incurred in the Quartermaster procurement office (R. 32-33). The same check was later identified by Levy, the company secretary-treasurer, who testified that he signed it for Rubin on the latter's representation that he needed it "to give as a present" to the people that helped him on the contract (Tr. 422).

Carlin also described the meetings which he attended in April and June 1952 with the company officers, Ades and Levy, when they sought Rubin's help (see *supra*, p. 7). Specifically, he testified, as did Levy (in more detail), Ades and, to some extent, Rubin, as to Rubin's assurances that he could secure government contracts (R. 26, 28, 31); Rubin's demands for compensation (R. 27); Rubin's purported government contacts (R. 26, 30, 38); and indications from Rubin

that he would need money to return favors extended to him (R. 30). Carlin further alluded to Rubin's subsequent aid in such matters as supplying the company with samples (R. 31) and securing an extension of delivery dates (R. 39).

At the end of Carlin's direct testimony, counsel for petitioner Lev elicited from the witness that, during his nine-month association with Bonita, he had nothing to do with Lev; that Lev's name was not mentioned in any way; and that Lev had nothing whatever to do with the transactions which the witness had described (R. 39–40, 41).

Counsel for petitioner Rubin, after general inquiries directed mainly at establishing the origin of Carlin's association with Bonita, asked, "Mr. Carlin, when is the first time that you gave a statement to any Government agency concerning the events that you testified to here this morning?" Over the government's objection based on lack of foundation, the witness was permitted to answer (R. 45). Carlin said that he recalled the circumstances, but not the time nor the name of the agency. He said that he later learned that the two gentlemen who came to his office were "the first contacts I had was [with] what was later to be hearings held in Washington," and that they appeared approximately six months before these hearings (R. 45–46). Counsel suggested, and Carlin agreed, that the men were Senate investigators (R. 45), and that their names were Poole and Balaban (R. 46). Carlin said he gave them a statement; he said he believed he signed it (R. 46). Counsel then requested production of the statement. The court

sustained the government's objection that no sufficient foundation had been laid for production. It ruled further that no foundation had been laid for counsel's request that it (the court) look at the statement to see if there were inconsistencies (R. 46).

Thereafter, the witness, in answer to a query by Rubin's counsel, stated that, so far as he could remember, he had told Poole and Balaban nothing different from what he had testified at the trial (R. 46), and that, if they had asked him whether he had himself posted the thousand dollar entry under "Entertainment," he must have surely said that he did, since the entry was made in his handwriting (R. 48–49).

Counsel for petitioner Wool had no questions for this witness (R. 64).

Excerpts from Carlin's testimony at a hearing before the Senate Committee were then read by counsel for another defendant (Hort) in cross-examination and by government counsel on redirect. The excerpts described the representations made by Rubin as to his contacts at the procurement office and his alleged ability to secure contracts (R. 66–73).

The court, in a colloquy with Rubin's counsel outside the presence of the jury, reaffirmed its ruling with respect to what Carlin told investigators Balaban and Poole, saying in part (R. 74):

> * * * You must at least indicate to me something that makes it appear that there might have been something inconsistent in that statement. Then I would read it over. But there wasn't the slightest indication. As matter of fact, everything you brought out indicated that it was consistent. The mere request doesn't

> make it necessary for me to look at it. Otherwise the Court would be busy all day long looking at every possible document that had anticipated the case. * * *

The record before the Court of Appeals. On appeal, the Assistant United States Attorney who had prosecuted the case in March and April 1957 filed with the Court of Appeals his sworn affidavit (R. 75-76). He stated that, at the time of the demand for the alleged signed statement of the witness Carlin to the two Senate investigators (Balaban and Poole), he had no such statement or report of an interview in his possession, and that he had no knowledge of the existence of either. He further stated that, following this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, in June 1957, he sought the aid of the Senate Permanent Subcommittee on Investigations,[3] and that a search of that Committee's file revealed no statement signed by Carlin, but merely a copy of a memorandum prepared on March 17, 1955, by investigators Balaban and Poole after an interview with Carlin. The prosecutor's affidavit recited that this memorandum, reporting the interview, had been signed and dated by Balaban and was attached in a sealed envelope. Also attached was an affidavit executed by Balaban.

Balaban's affidavit recited that, in the course of his investigation of fraudulent textile procurement practices in the military services, he and Poole interviewed Carlin; that this was the only interview; and

---

[3] A Subcommittee of the Senate Committee on Government Operations.

that no signed statement was obtained from Carlin. The affidavit recited that, following the interview, Balaban prepared a memorandum for Chief Counsel Kennedy (of the Senate Subcommittee), in which he summarized generally what Carlin had related; that the memorandum, prepared on March 17, 1955, was the only memorandum known to be in the Subcommittee files; and that it was neither adopted nor approved by Carlin, nor was it a substantially verbatim recital of an oral statement made by Carlin.

Attached also was a letter from the Acting Chief Counsel of the Senate Committee, addressed to the prosecutor, verifying that a check of Subcommittee files disclosed no record of any interrogation or interview concerning Carlin other than that reflected in the Balaban memorandum.

SUMMARY OF ARGUMENT

During the trial of this case, which occurred before the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, a secondary government witness, who had testified before a Senate Committee, stated on cross-examination that he had talked with a Committee investigator some time before his public testimony, and thought that he had signed a statement for the investigator. A request for the statement, by counsel for one of the three petitioners, was refused on the ground that there was no showing of inconsistency. When this case came on appeal, after *Jencks*, the prosecutor submitted to the Court of Appeals an affidavit stating that he had not known of the existence of any such document at the time of

the trial; that thereafter he had learned from the Senate Committee that the only document they had was, not a statement by the witness, but the investigator's summary of his interview with the witness. The investigator submitted an affidavit to the effect that the report was made after the interview and was a summary, not a substantially verbatim account of what the witness had said. The summary was submitted under seal to the Court of Appeals. The Court of Appeals held that there was no occasion to reverse the conviction since the document was not a statement which would now be subject to production under the "Jencks" Act, 18 U.S.C. 3500.

The government's position is that the summary would clearly not now be subject to production under 18 U.S.C. 3500; that the Congressional determination that production of such a document is not required is constitutionally valid; that *Jencks* did not require production of this type of paper; and that, apart from the statute, non-production of the summary, even if error, was clearly harmless in the circumstances of this case.

I

By the "Jencks" Act, 18 U.S.C. 3500, Congress excluded investigative summaries of prior oral statements from production for purposes of impeachment of a witness. The judgment that this was a desirable procedure was within the constitutional power of Congress.

A. The definition in 18 U.S.C. 3500(e), *supra*, p. 6, of the kind of document which must be produced on demand, after a witness has testified, clearly excludes

from its coverage a summary of an interview with a witness unless the statement has been seen and adopted by the witness. The only documents which the witness has not seen and approved, made subject to production, are stenographic or mechanical recordings, or the equivalent thereof, *i.e.*, "a substantially verbatim recital" of an oral statement "recorded contemporaneously." The legislative history makes clear that it was the deliberate congressional judgment that it would not be wise to permit a witness to be impeached on the basis of a statement, not signed or adopted by him, which represents an investigator's hearsay summary of what the witness has said. The only reports which Congress thought a proper basis for impeachment are reports directly attributable to the witness so that it would be unnecessary to decide what part of the report reflects the mind of the witness and what the mind of the investigator. In short, the theory behind the legislation is that a witness should be impeached only on the basis of a statement which is truly and wholly his.

B. Congress was acting within its acknowledged sphere of power when it defined the kind of statements which must be produced for impeachment of the witness and those which should not be produced for that purpose. The authority of Congress to prescribe rules of evidence for use in the inferior federal courts has long been recognized. If the Congressional judgment as to kind of statements which ought to be produced is a rational one, founded in reason and experience, the statute is not subject to attack on constitutional grounds.

In Anglo-American jurisprudence, extra-judicial statements have long been regarded as suspect, and as a result of the hearsay rule, they are admissible only in exceptional circumstances which tend to provide strong assurance of reliability. An investigator's summary of what a witness has said is of course hearsay. The Congressional judgment that such hearsay does not have sufficient earmarks of reliability to warrant production, far from being irrational or unusual, is in the main stream of the common law. See *Palmer* v. *Hoffman,* 318 U.S. 109; *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (C.A.D.C.); *Communist Party* v. *Subversive Activities Control Board,* 254 F. 2d 314, 325 (C.A.D.C.).

In *Jencks,* this Court pointed out that the value of statements of a witness for purposes of impeachment is not limited to flat contradiction; that the "omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment," are also relevant. Precisely because these subtle variations are significant, it is important that the statement be that of the witness and not that of the investigator. The omission of facts, the contrast in emphasis, and the difference in order of treatment could all stem as easily from the investigator as from the witness. A summary by an investigator, particularly one written some time after the interview, must always to some degree represent the joint product of the minds of the witness and of the investigator. For this reason, a summary by an investigator does not begin to have any reliable impeaching value until it can be determined what de-

tail and what emphasis is attributable to the witness and what to the investigator.

Any attempt to settle the question of how much of a summary is attributable to the witness and how much to the investigator could transform a trial on the issue of guilt into a trial on the collateral issue of authorship of the statement. The deliberate Congressional decision requiring production only of statements truly attributable to the witness protects against the danger that the trial will degenerate into a battle on such collateral issues. The Congressional distinction is founded on the same general considerations of policy which underlie judicially-developed limitations upon cross-examination and impeachment which have as their objective the reduction of trial confusion. Traditionally, cross-examination and impeachment are not allowed to become a device for sidetracking and delaying the trial on issues collateral to the main cause.

II

A. The Court of Appeals had the right to consider the affidavits of the prosecutor and the investigator, as well as the Senate investigator's summary of his interview with the witness, in deciding whether it should reverse the judgment on that ground. The function of the appellate court was to determine whether the conviction should be set aside because of substantial error at the trial. If the claimed error as to production of the document was discovered to rest on an *assumption* of fact (*i.e.*, that the report was the witness' own) which turned out, plainly and clearly, not to be the fact, there would be no occasion to reverse.

The Court of Appeals therefore could properly consider whether a controversy as to the facts relating to the document did actually exist, just as it could consider external facts to determine whether a cause is moot or whether a suit is collusive.

B. As more fully developed in the government's brief in *Rosenberg*, No. 451, a court may look at documents *in camera* to decide whether they are the kind of papers which are subject to production. If Congress has the right to define the documents which are properly to be subject to production, as we have argued in Point I, *supra*, it is appropriate for the court to sort out the documents which Congress has said should be produced from those which Congress has said should not be produced. The defense is entitled to see only those which are to be produced, not the others. Here, the Court of Appeals had the solemn and sworn assurance of the prosecutor and the investigator as to the nature of the document, and also had the document before it. It therefore could properly decide that the document was not one which would be subject to production under 18 U.S.C. 3500.

C. Consideration by the Court of Appeals of the document did not violate the principle against *ex post facto* legislation, whether or not it would have been subject to production under *Jencks* v. *United States*, 353 U.S. 657. A change in the rules of evidence permitting the admission of documentary evidence excludable at the time of the offense has been held not so fundamental as to be inapplicable under *ex post facto* principles. *Thompson* v. *Missouri*, 171 U.S. 380. A statute which alters rights only as to

the kind of document subject to inspection, and which at best might possibly be useful for impeachment, represents a less substantial change. *Hopt* v. *Utah*, 110 U.S. 574, 590.

III

The premise of petitioner's entire argument is that non-production of the document here in issue would have been error under the decision in *Jencks*—a question which the Court of Appeals did not reach. We submit that this assumption is erroneous. *Jencks* was different in several significant ways.

In *Jencks*, the two Government witnesses (Ford and Matusow) were crucial and were paid to make reports to the Government; here, the witness (Carlin) was secondary and not a paid informant. In *Jencks*, the witnesses' reports were contemporaneous with the events; here, the Senate investigator's interview with Carlin took place three years after the events. In *Jencks*, the statements were indisputably the witnesses' own; here, the report was that of an investigator. In *Jencks*, the prior statements furnished the main means of testing the witnesses's credibility at the trial; here, Carlin had previously testified at an open Senate hearing (following his interview with the Senate investigators) and the transcript of that sworn testimony was fully available to the defense and was used at the trial. Finally, unlike *Jencks*, the prosecution here did not have the investigator's summary in its possession at the trial and did not know of its existence.

IV

A. Even if non-production of the document was error, it was harmless in this case. Only petitioner Rubin moved for production of the report of Carlin's interview with the Senate investigator. The failure of the other petitioners to do so is quite understandable for Carlin's testimony had no bearing on the case against them. His testimony, aside from identifying Bonita company records, related to the initial formation of the "cap" aspect of the conspiracy (*supra*, pp. 15–16), in which petitioner Lev was not involved at all, and into which petitioner Wool entered at a late stage.

Carlin's testimony was not even significant as to Rubin. Most of the facts testified to by Carlin were admitted by Rubin himself when he took the stand. Beyond that, Carlin testified to posting a $1,000 check to "entertainment." It was witness Levy, however, who testified that Rubin said this check was needed to reward government personnel, and suggested that such payments be charged to travel and entertainment expenses. Evidence by Carlin as to this one entry was certainly insignificant in view of the testimony of Levy, described as "devastating" by the court below, the testimony of former government personnel (some of whom had succumbed to bribery), and the admissions by Rubin himself. Carlin's entire testimony could have been dispensed with, without denting the government's overwhelming proof.

B. *Jencks* has not been (by the lower courts) and should not be interpreted as holding that never, under any circumstances, may the failure to produce a prior

statement as to any witness, no matter how inconsequential, be deemed non-prejudicial. Harmless error by its very nature is a problem to be resolved on the particular facts of each particular case. In the light of all the evidence in this case, and the opportunity to test Carlin's testimony in other ways, the failure to order production of a summary of a Senate investigator's interview with this secondary witness does not justify reversal of this conviction.

C. Petitioners attempt to give special significance to the ruling on Carlin's testimony by asserting that, since Carlin was an early witness, the ruling must be assumed to have influenced their later conduct at the trial in not asking for other statements. The record shows, however, that counsel exhibited no such reluctance as to objections to the admissibility of evidence, and there is no reason to believe that this early ruling caused them to refrain from taking other action at the trial with regard to other witnesses. This case was being tried in the Second Circuit which had what was considered, at the time, an advanced rule as to production of statements and reports. The trial judge, in ruling on Rubin's demand for production as to Carlin, said that he would look at a document if there were "something that tends to make us believe that there was something inconsistent" in it. To say that this ruling intimidated or deterred counsel from attempting to obtain other statements is an attempt to find some basis for asserting prejudice where none in fact exists.

502839—59——3

ARGUMENT

Introduction

The document involved in this case, which is on file with this Court, is a Senate investigator's summary of what witness Carlin had told the investigator concerning events which occurred more than three years before the interview. The summary was not written by the witness, but was made by the investigator some time after the interview. In a sworn affidavit, the investigator describes it as a memorandum in which he "summarized generally what Carlin had related." The memorandum was not seen, adopted or approved by the witness. It was not used by the prosecution before or at the trial and was neither seen nor used by the witness. After making the statement to the investigator, the witness testified before the Senate Committee at an open hearing. This sworn testimony at the hearing was not only available but was actually used as a basis for cross-examination at the trial. The specific issues which this case presents are whether, under these circumstances, the failure to turn over to the defense the Senate investigator's summary was error, and, if so, whether it was the kind of error which requires a new trial.

The Court of Appeals, which had the document before it,[4] held that even if, under the decision of this Court in *Jencks* v. *United States,* 353 U.S. 657, the document should have been produced—an issue

[4] As noted *supra*, p. 18, the prosecutor did not have the document in his possession at the time of trial. He filed a copy with the Court of Appeals, together with the affidavit of the investigator stating how the document was prepared.

which the court did not decide—there was nevertheless no reason to reverse the conviction since now, under the so-called "Jencks" Act (18 U.S.C. 3500), production would not be required. Petitioners challenge this holding in various respects. As to 18 U.S.C. 3500, they argue that the Court of Appeals erred in making for itself the determination whether the document was a "statement" under 18 U.S.C. 3500; and that, if the statute precludes the production of an investigator's summary of a witness's out-of-court statement, it is unconstitutional. Beyond this, they argue that, since their trial was held before enactment of 18 U.S.C. 3500, their conviction should be reversed regardless of the application of the statute to any future trial.

Since this is the first of a series of cases in which the Court is considering the application and constitutionality of various provisions of 18 U.S.C. 3500, we shall discuss, at the outset, the problems arising under that statute as it applies to this case. We urge that it was the judgment of Congress, expressed in the statute, that an investigator's summary of an oral report of a witness is not a proper basis for impeachment of the witness; that this Congressional judgment is a reasonable one, founded in logic and experience; and that the statute is accordingly free from constitutional objection on this ground.[5] We

[5] There is further discussion of the "Jencks" Act in the Government's briefs in No. 451, *Rosenberg* v. *United States*, at pp. 30–62, and in No. 488, *Scales* v. *United States*, at pp. 99–108. The argument in our brief in No. 471, *Palermo* v. *United States*, pp. 17–21, mainly rests on the argument in the present case. The discussion in our brief in Nos. 489, 491,

also show that it was entirely proper for the Court of Appeals to consider whether the statement was one as to which production could be required under the statute.

Finally, we shall examine the case apart from 18 U.S.C. 3500. We shall argue that, under the rule of the *Jencks* case, production was not required, and that, even if it was, the error, viewed in the context of this case, cannot be deemed prejudicial.

I. By 18 U.S.C. 3500, Congress excluded summaries of prior oral statements from production for purposes of impeachment of a witness. The judgment that this was desirable procedure was within the constitutional power of the Congress

A. The purpose of Congress in enacting 18 U.S.C. 3500 was to permit a witness to be impeached by his own statements, but not by memoranda of other persons purporting to summarize what the witness said

1. *The statutory language*

18 U.S.C. 3500 prohibits discovery of any statement or report until after the witness has testified. See the Brief for the United States in *Rosenberg* v. *United States*, No. 451, at pp. 30–42. Thereafter, on motion of the defendant, the court is to order the production of any statement, as defined in the legislation, relating to the subject matter of the testimony of the witness. "Statement" is defined as follows:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

---

Pittsburgh Plate Glass Co. v. *United States* and *Galax Mirror Co.* v. *United States*, pp. 16, 34–35, is confined to the bearing of the "Jencks" Act on the production of grand jury testimony.

> (2) a stenographic, mechanical, electrical, or other *recording,* or a transcription thereof, which is a *substantially verbatim* recital of an oral statement made by said witness to an agent of the Government and *recorded contemporaneously* with the making of such oral statement. [Emphasis added.]

The manifest purpose is to permit impeachment by the witness' *own* prior statement. The statement, even though it is phrased in the investigator's words, is treated as the written statement of the witness if he has in fact approved and adopted it. A statement is also deemed to be the witness' own statement if it is a stenographic, mechanical, electrical or other recording (or transcription thereof), provided that it is a substantially verbatim recordation contemporaneously made.

But a summary of what the witness has said, made by a person other than the witness, some time after the interview, and never adopted by the witness, necessarily falls outside the definition. Such a summary is not the statement of the witness himself. To some degree, never precisely ascertainable, such a summary inevitably reflects the judgment and emphasis of the person making the summary. As we show below, it was the considered congressional judgment that such a summary does not constitute an adequate basis for impeachment of a witness at the trial.

2. The background and general purpose of 18 U.S.C. 3500

18 U.S.C. 3500 followed upon the decision of this Court in *Jencks* v. *United States,* 353 U.S. 657, and,

even more, the uncertainty, reflected in decisions of the lower federal courts, as to its proper application.

The Jencks decision. In *Jencks,* this Court reversed the conviction of a labor union official who had been charged with filing a false non-Communist affidavit with the National Labor Relations Board. The ground of reversal was that the trial court had erroneously denied Jencks' motions for the production of Government reports. At the trial, the Government had relied heavily upon the testimony of two Communist Party members, Ford and Matusow, who had become paid undercover agents for the F.B.I. They testified at length, on direct examination, as to events and conversation which associated Jencks with the Communist Party. Upon cross-examination, they testified that these events and occurrences were described in oral and written reports which they made to the F.B.I. They could not remember which of their reports were oral and which were written. Thereupon, counsel for Jencks, with a view to impeachment, moved the court for an order requiring the Government to produce, for inspection by the court, the reports relating to certain specified events and conversations as to which the witnesses had testified. The trial court denied the motions on the ground that no preliminary foundation, suggesting inconsistency, had been laid; the Court of Appeals affirmed on the same ground. In reversing, this Court noted the crucial nature of the testimony of Ford and Matusow, and the apparent value of the requested reports to impeach that testimony. It held:

(1) The defense was entitled to an order directing the Government "to produce for inspection all reports

of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial." 353 U.S. at 668.

(2) The Court reaffirmed the requirement of laying a foundation, referring to *Gordon* v. *United States,* 344 U.S. 414, at 419, in which it was said that "[t]he demand was for production of * * * *specific documents and did not propose any broad or blind fishing expedition* * * * on the chance that something impeaching might turn up." 353 U.S. at 666–667. It concluded that a sufficient foundation had been established by the testimony of the two witnesses that their reports concerned the very events and activities related in their trial testimony.

(3) Because only the defense was adequately equipped to determine the effective use of such reports to discredit a Government witness, it was entitled to see them initially. The Court disapproved the practice of submitting Government documents to the trial judge for a determination of relevancy and materiality, without hearing the defendant, stating (353 U.S. at 669): "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness."

(4) A criminal action must be dismissed when the Government, on the ground or privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports of Government witnesses touching the subject matter of their testimony at trial.

The Court, in *Jencks*, was dealing with reports by crucial Government witnesses, paid to make such reports, who recorded the events to which their testimony related immediately after those events occurred. Thus, the Court stated that the witness Ford had said that "his reports were made immediately following each meeting, while the events were still fresh in his memory" (353 U.S. at 665), and, further, as to both Matusow and Ford, that they were paid by the FBI "contemporaneously to make oral or written reports" (353 U.S. at 659). The Court obviously considered the reports, whether written or oral, as being the statements of the witnesses or the equivalent. It had no occasion in that case to consider the differences between reports which are essentially the witness' own reports and reports which represent merely a later summary of an investigator's impressions of what the witness has said.

Moreover, the Court's holding in *Jencks* that defense counsel was entitled to determine the usefulness of the documents was made in a case where there was no dispute as to their relevancy. The documents clearly related to the witnesses' testimony. The decision represented disapproval of the then prevailing rule established in the Second Circuit that, even where there were written statements of a witness which clearly related to his testimony at the trial, the trial court would first look at the document to see whether there was such a discrepancy between it and the testimony of the witness at the trial that the

documents could be said to have impeaching value. See the Court's citation in fn. 14, 353 U.S. at 669; cf. *United States* v. *Krulewitch,* 145 F. 2d 76, 92 (C.A. 2); *United States* v. *Ebeling,* 146 F. 2d 254, 256 (C.A. 2); *United States* v. *Beekman,* 155 F. 2d 580, 584 (C.A. 2); *United States* v. *Grayson,* 166 F. 2d 863, 869 (C.A. 2). The Court had no occasion to consider what procedure should be followed where the Government claimed that it had no statement by the witness which could be said to be his, or where it claimed that a statement by the witness had no bearing at all on his testimony at the trial.[6]

Lower courts' decisions after Jencks. These and other questions which this Court had no occasion to consider in *Jencks* did soon come before the lower federal courts. The reach of the *Jencks* decision became a subject of confusion and of conflicting rulings. Thus, some courts held that the trial court still had the right to determine in the first instance whether the Government did have a statement of the witness relating to his testimony at the trial; others that the trial court was not supposed to determine any question of relevancy and that the Government was required in the first instance to turn over its complete file on the case to the defendant. Ignoring both the factual situation in *Jencks* and the repeated emphasis in the *Jencks* opinion that the reports, in order to be subject to production, must be shown to relate to the testi-

---

[6] The latter problem is discussed more extensively in the Brief for the United States in *Rosenberg* v. *United States,* No. 451, this Term, at pp. 42–62.

mony of the witness (353 U.S. at 668, 669), some district courts lifted the Court's language out of context and ordered complete files and reports of law enforcement agencies turned over to defendants, summarily dismissing the actions when the Government failed to comply. Thus, in *United States* v. *Alvin Clark*, a narcotics case in the Western District of Pennsylvania, the trial court ordered the production of the entire Narcotics Bureau report and after non-production summarily dismissed. In *United States* v. *Ida A. Stanley*, a wagering tax act case in the Northern District of Georgia, the court ordered the production of the entire intelligence report, although the one Government witness who had testified, a supervisor, had stated that he had not prepared the actual report and that his function was only to review. When the Government resisted production of the entire report, since the witness had testified only to his part in the raid and arrest, the court dismissed.

Some courts held that the only statements of the witness which had to be produced under *Jencks* were contemporaneous ones; others that all documents of any kind which originated from some oral statement of the witness—whether in the words of the witness or the words of the summarizer—had to be produced. In *United States* v. *George Allen Leonard*, a narcotics case in the Northern District of Georgia, the United States Attorney assured the court that there were no written statements by the witnesses who had testified. He declined to produce the investigator's entire report, including summaries of oral statements of the witnesses neither read nor adopted by them. The court

dismissed.[1] Compare *United States* v. *Anderson*, 154 F. Supp. 374 (E.D. Mo.), where Chief Judge George H. Moore, setting up a standard of production based on *Jencks*, observed:

> Category (b) [an established statement made by the witness] includes only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States, and does not include notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes.

There was also disagreement as to *when* production was required. Although the issue in *Jencks* was the test of credibility of the witness at trial, some courts interpreted *Jencks* to authorize pre-trial production of statements and reports. *United States* v. *Ernest Hall*, 153 F. Supp. 661 (W.D. Ky.); cf. *United States* v. *Anderson*, *supra*.

These conflicts were not easily subject to judicial resolution. If the Government declined to comply with a court order, believing it to go beyond *Jencks*, the result was the dismissal of the prosecution, without any right of the Government to appeal. If the Government complied with an order, even if it felt it was too broad, there was no issue for appellate review. It was that situation, as the legislative history shows, which gave rise to the legislation which became 18 U.S.C. 3500.

---

[1] The unreported cases cited in this paragraph were collected in a brief printed as part of the record in the Senate debates on S. 2377, 103 Cong. Rec. 15938.

General legislative history. Posing these problems, and pointing out that there was immediate need for legislation to set definite guide lines for the trial courts to follow in applying the principles of the *Jencks* case, Attorney General Brownell spoke, in hearings had before the Senate Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary, on behalf of the passage of S. 2377, legislation which he said would establish the following procedures (S. Rept. No. 569, 85th Cong., 1st Sess., pp. 4–8):

> 1. Provide that only reports or statements which related to the subject matter as to which the witness had testified would be subject to production.
>
> 2. Give the court the power to excise from any such statement or report matter which did not relate to the subject matter of the testimony of the witness who made it.
>
> 3. Make it clear that the Government need produce only reports or statements of a witness which were signed by him or otherwise adopted or approved by him as correct.
>
> 4. Provide that statements and reports to be used for impeachment of a Government witness were not subject to production until the witness had testified.
>
> 5. Provide that if the Government declined to produce such a statement or report, the court should either strike the testimony affected or order a mistrial.

The statement of the Senate Committee accompanying the proposed legislation pointed out that it was not designed to nullify or limit the principle

that a defendant on trial in a criminal case is entitled to authenticated reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial. The Committee declared (S. Rept. 569, 85th Cong., 1st Sess., p. 2):

> The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with *authenticated statements and reports* of Government witnesses which relate *directly* upon his [their] testimony. [Emphasis added.]

This purpose of the legislation to set up a *modus operandi* is stressed repeatedly in the legislative history. See also S. Rept. No. 981, 85th Cong., 1st Sess., p. 3; H. Rept. No. 700, 85th Cong., 1st Sess., p. 2. In a brief submitted by Senator O'Mahoney as part of the record, the objectives of the Senate bill are stated as twofold: (1) to clarify the principle of the opinion in *Jencks* and (2) to provide for the orderly implementation of that principle by establishing a set procedure to regularize the demand for, and production of, statements and reports of witnesses in Government files. 103 Cong. Rec. 15939.

In other words, the purpose of the Department of Justice in supporting the legislation, and the purpose of Congress in enacting it, was not to overrule the basic holding of *Jencks*, but to clarify what the basic holding was understood to be, and to regulate the procedural problems which followed in the wake of that holding.

For present purposes, the most important aspect of the statute is the provision defining the kind of statement to which defendants may have access.

3. The legislative purpose in excluding summaries neither signed nor adopted by the witness

The legislative history makes clear, as does the language of the statute itself, that it was the congressional judgment that it would not be wise to permit a witness to be impeached on the basis of an investigator's summary of an interview with a witness, unless the witness had adopted or approved it.

In hearings before a Senate subcommittee of the Committee on the Judiciary, on June 28, 1957, Attorney General Brownell, on behalf of S. 2377, noted that the most serious law enforcement problem had arisen because of the insistence by some courts that *Jencks* required that entire reports of federal investigative agencies be turned over to the defense—including, among many other things, investigative materials such as reports of interviews with possible witnesses or other persons supplying "raw" and unverified personal information. He continued, in part (S. Rept. 569, 85th Cong., 1st Sess., p. 7):

> The second problem arises from the fact that in the *Jencks* case the Court ordered the Government to produce reports orally made by the witness. This raises a grave problem, and the general language of the opinion must be given a reasonable interpretation to prevent serious unfairness. The Department takes the position that unless the witness has been in some way informed of the statements attributed to him, and has indicated his approval of

> their accuracy, that such reports should not be turned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of a witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else.

The legislation, as introduced in the Senate on July 1, 1957, provided for the disclosure (initially to the court *in camera*) of only such reports or statements of the witness "as are signed by the witness, or otherwise adopted or approved by him as correct * * *" (S. Rept. 569, 85th Cong., 1st Sess., p. 10). As a result of further study by the subcommittee, this language was amended to provide for the production of "any written statements previously made by the witness * * * which are signed * * * or otherwise adopted or approved by him, and any transcriptions or recordings of oral statements made by the witness to a Federal law officer * * *" (S. Rept. 981, 85th Cong., 1st Sess., p. 1). As offered for consideration in the Senate on August 23, 1957, the bill provided, in this same language, for the production of written statements. As to oral statements, however, it read: "[A]ny transcriptions or *records* of oral statements made by the witness to an agent of the Government * * *" (Emphasis added; 103 Cong. Rec. 15787).

The Department of Justice expressed strong opposition to this use of the word "records," which had been substituted for the word "recordings" appearing in the earlier version of the statute. In a letter to

Senator Eastland of the Judiciary Committee, dated August 22, 1957, Acting Attorney General Rogers pointed out that the word "records" might be construed to include reports and files generally, and to "authorize the very rummaging through Government investigative files that the legislation is intended to prevent." He added that, in the context in which the language was used and in view of the positions taken by some Senators, the use of "records" might be taken to include the Government's internal working papers, including memoranda, notes, files, and even grand jury testimony. This, he said, would inevitably reveal investigative techniques, confidential information, and identity of informants and complainants (103 Cong. Rec. 15791).

Senator Dirksen, on August 26th, offered an amendment to reinstate the word "recordings" in place of the word "records." In support of the proposed amendment, Senator Hruska stated (103 Cong. Rec. 15931):

> * * * If the language remains as it is in the bill, many documents for which the witness himself is not responsible will be available for the purpose of impeaching the witness.
>
> I should like to give several illustrations of that. The investigative files, which almost invariably include material of a confidential nature, would be included in the definition of the word "records". That would reach the *summary reports* to which I have referred, which represent not the words of a witness whom it is sought to impeach, but, instead, the words of some third person's understanding of what the witness said. [Emphasis added.]

Senator O'Mahoney, sponsor of the legislation, argued that the requested change was of trivial importance and that the fears of the Acting Attorney General were exaggerated. In answer to a query, he said that an agent's notation from memory as to what a witness had said, neither seen nor approved by the witness, would in any event be inadmissible as hearsay (103 Cong. Rec. 15932). He argued that the word "records" was adequately limited in the context used (*i.e.*, "records of oral statements made by the witness to an agent of the Government") (103 Cong. Rec. 15934). The amendment to substitute the word "recordings" for "records" was defeated (103 Cong. Rec. 15935), and, despite the observation of Senator Dirksen that the bill's phraseology was compounding confusion, it passed the Senate (103 Cong. Rec. 15938).

The following day, August 27th, Mr. Rogers addressed a letter to Congressman (now Senator) Keating of the House of Representatives giving the Justice Department's views on S. 2377, as passed by the Senate. He noted that the Senate version would require the production of statements never signed, adopted or approved by a witness and that the word "records", in the Senate version, would be broad enough to include internal working papers, Government counsel's memoranda, notes and files of investigative agents, and even grand jury testimony. He expressed the view of the Department of Justice that the pending House version of the bill (H.R. 7915) was a far more accurate statement of the procedure

contemplated by the *Jencks* decision than the Senate version (103 Cong. Rec. 16119).

This House version, introduced on July 5, 1957, provided for the production (for inspection *in camera,* initially) of only such reports or statements of the witness "as are signed by the witness, or otherwise adopted or approved by him as correct * * *." The accompanying report (H. Rept. No. 700, 85th Cong., 1st Sess.) pointed out (pp. 5–6):

> The bill makes it clear that the Government need produce only the reports by the witness or statements by the witness which the Government has in its possession which are signed by him or otherwise adopted or approved by him as correct (subsec. (b)). It further provides that such statements and reports are to be used for impeachment purposes only and then only of Government witnesses and are not subject to production until the witness has been called and has testified for the Government (subsec. (b)). Unless a witness has adopted or otherwise approved reports made to the Government, it is not to be turned over to the defense (subsec. (b)). Such material, insofar as the witness is concerned, is hearsay evidence and should not be used to attack his credibility when he is being cross-examined.
>
> * * * * *
>
> * * * Without this provision the general language of the Jencks case could be interpreted as requiring the production of summaries of oral statements made by witnesses to a law-enforcement agent which the witness had never seen or in any way approved. Unless the witness has been in some way informed of the statements attributed to him and has indicated his

approval of their accuracy, the summaries should not be turned over to the defense. * * *

* * * * *

It has always been, and will remain, the practice of the F.B.I. and every other Federal law enforcement agency to take written statements of important witnesses. * * *

Where it is impossible to obtain the signature of the witness to his statement, or where because the matter is relatively unimportant a signed statement was not originally requested, it is the practice in many cases to obtain the approval or adoption by the witness of the summary which has been made of his interview. Whenever this is done, the fact of such approval or adoption is made a matter of record and it is this type of statement, in addition to signed statements, which would be subject to production under the bill.

Where, however, it has been impossible to obtain any verification from the witness that a summary of an interview is correct, it is quite clear that such an unverified and unauthenticated summary could not be used legitimately for impeachment purposes.

On the floor of the House, Congressman Yates asked if this House version would permit examination of only a written report. Congressman Keating replied that, in his opinion and in the opinion of the Attorney General, the *Jencks* case held only that the Government would have to produce statements which had been identified and approved in some formal way by the witness, either signed by him, initialed by him, or taken down in a question-and-answer form and then approved by him (103 Cong. Rec. 16119).

H.R. 7915 passed the House in this form (103 Cong. Rec. 16130), and the bill went to conference (103 Cong. Rec. 16131, 16084).

The bill emerged from conference and was agreed upon by both houses of Congress (103 Cong. Rec. 16489, 16742) with the language of the present provision, which defines the type of statement subject to disclosure (H. Rept. No. 1271, 85th Cong., 1st Sess., p. 2). Although Congress substantially adopted the Senate bill, it used the word "recording" instead of "record," thus indicating its intention not to require production of agents' summaries. The conference bill made specific the type of recordings contemplated:

> [A] stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

"Substantially verbatim" is coupled with "recorded contemporaneously," making explicit the congressional intent that there should be used for impeachment purposes only those summaries of oral reports which can fairly be regarded as the witness' own words.

The House conference report also makes this clear (H. Rept. 1271, 85th Cong., 1st Sess.):

> Another difference discussed by the conferees concerned the provisions of the Senate bill, which extended the types of statements covered by the bill to include "transcriptions or records of oral statements" made by the witness to an

> agent of the Government. To remove any doubt as to the kinds of statements affected by the bill as agreed to by the conferees, a new paragraph "e" was added to the proposed section 3500 of title 18 of the United States Code expressly defining the term "statement".
>
> It is believed that the provisions of the bill as agreed to by the conferees are in line with the standard enunciated by Judge George H. Moore of the eastern district of Missouri in a Finding of Fact and Conclusion of Law filed June 18, 1957, in *U.S.* v. *Anderson et al.*, which is set forth at page 14552 of the daily Congressional Record of August 26, 1957.

The *Anderson* case to which the House report referred is that discussed at page 37, *supra,* where Judge Moore interpreted *Jencks* as applying only to "continuous, narrative statements made by the witness recorded verbatim, or nearly so," and not to reports or notes made during an interview which contain subjective conclusions or impressions of the investigator.

In the Senate, Senator O'Mahoney explained that this language was devised to clear up the doubts of the Justice Department as to the "latitude for the examination of irrelevant reports of agents" (103 Cong. Rec. 16487). Senator Dirksen said that the revised text had the concurrence of the Justice Department (103 Cong. Rec. 16489). Senator Javits, with the agreement of Senator O'Mahoney, observed (103 Cong. Rec. 16488):

> As a practical matter, then, what has been done with the so-called records provision is to tie it down to those cases in which the agent actually purports to make a substantially ver-

> batim recital of an oral statement that the witness has made to him—*not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him* * * *. [Emphasis added.]

In the House, Representative Keating explained (103 Cong. Rec. 16739):

> * * * The conferees provided that the only statements a defendant could see, and then only in the courtroom were those actually signed or formally approved by the witness or a stenographic verbatim recital of a statement made by a witness which is recorded contemporaneously with the making of such oral statement. In other words, *only those statements need be produced in court by the Government which could be shown in court to impeach the credibility of the witness.* [Emphasis added.]

Congress, then, was unmistakably of the view that non-verbatim summaries by an investigator are not to be treated as the statements of the witness, and that a witness should not be impeached by a statement which is not his own, unless he adopts or approves it. The only summaries of oral interviews which Congress was willing to accept were summaries which could be equated to an electrical transcription, *i.e.*, summaries which were both "substantially verbatim" and "recorded contemporaneously." The report had to be such that there could be no question but that the statement was directly attributable to the witness.

This legislative history is a complete refutation of the argument made by the petitioner in No. 435 (Pet. Br. 10–15) that a document, though not within the

definition of "statement" in paragraph (e), might somehow be deemed subject to discovery by virtue of the broad reference to reports in subsection (a). Senate Report No. 981 on S. 2377 stated (p. 2): "The purpose of the proposed legislation is * * * to provide the *exclusive* procedure for handling demands for the production of statements and reports of witnesses" (emphasis added). The purpose of subsection (a), as we develop in the brief for the Government in the case of *Rosenberg* v. *United States,* No. 451, pp. 30–42, was to make certain that no statement or report made by a Government witness to an agent of the Government, whether or not ultimately subject to discovery, was to be inspected prior to trial; and that production even of a written statement or electrical recording should not take place until after the witness had testified at the trial. In thus making clear that there was to be no production *before* trial, Congress certainly did not enlarge its definition of what was to be subject to production *at the trial.*

B. The congressional judgment that a witness should not be impeached by a statement which is not his own is a rational one, consistent with the requirements of due process

Congress was acting within its acknowledged sphere of power when it defined the kind of statements which must be produced for impeachment of the witness and those which should not be produced for that purpose.

The authority of Congress to prescribe rules of evidence and procedure for use in the inferior federal courts (which are themselves established by Congress under the authority of Article 3, Section 1 of the Constitution) has long been recognized. *Wayman* v. *Southard,* 10 Wheat. 1, 22; *Tot* v. *United States,* 319 U.S. 463, 467, and cases cited; *Lutwak* v. *United*

States, 344 U.S. 604, 613–615; Rule 26, Federal Rules of Criminal Procedure. While this Court can, and frequently does, prescribe rules of evidence governing the lower federal courts (Rule 26, Federal Rules of Criminal Procedure; 18 U.S.C. 3771), once Congress has entered the field its determination of court procedure is controlling in the absence of a constitutional question.

This Court said in *Gordon* v. *United States,* 344 U.S. 414, 418:

> *In the absence of specific legislation,* questions of this nature are governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [Emphasis added.]

See, also, *Hawkins* v. *United States,* 358 U.S. 74, 78, where the Court noted that it would be appropriate for Congress to reconsider the rules governing the competency of a wife to testify against her husband.

In short, if the Congressional judgment as to the kind of statements which ought to be produced for purposes of impeachment is a rational one, founded in reason and experience, the statute is not subject to attack on constitutional grounds.

1. The statutory distinction between summaries prepared by an investigator, unverified by the witness, and the witness' own extra-judicial statements has a rational basis in experience

We have already indicated (*supra,* pp. 38–48) the doubts which Congress had as to the reliability, for impeachment purposes, of investigative summaries of statements made by potential witnesses. There is solid foundation for this doubt. In Anglo-American jurisprudence, extra-judicial statements have been regarded as suspect for centuries and, as a result of

the hearsay rule, they are admissible only in exceptional circumstances which tend to provide strong assurance of reliability, *e.g.*, where the out-of-court statement is a dying declaration, an admission against interest, or a routine entry made in the regular course of business. So far as the reports of investigators are concerned, it must be stressed that we are dealing not with what a witness said out of court but with what an investigator *said* he said. We submit that memoranda prepared by a hearer, not purporting to be a substantially verbatim recording or to be approved by the witness, could properly be treated by Congress as not having sufficient earmarks of reliability to warrant a requirement of production. Such a congressional judgment, far from being unusual or irrational, is in the mainstream of the common law.

It may be suggested that it is an investigator's business to make reports to his superiors and that this strengthens the credibility of the report. But, certainly a report which is a narrative account or summary of an oral interview, even though made in the course of business or profession, would never have been deemed admissible at common law as coming within the "shop book" or "business record" exceptions to the hearsay rule.

In *Palmer* v. *Hoffman,* 318 U.S. 109, a negligence suit arising out of a train wreck, this Court had occasion to consider the admissibility of a statement made by the locomotive engineer, two days after the accident, in the presence of railroad officials and a representative of the Massachusetts Public Utilities Commission. The engineer was unavailable as a witness at the trial, having died before its commence-

ment. The question was whether his report of what had occurred might be admitted into evidence under the Federal Business Records Act, 28 U.S.C. (1946 ed.) 695, which substantially liberalized the common law "shop book" rule.[5]

In holding that the report was inadmissible, Mr. Justice Douglas, speaking for a unanimous Court, stated (p. 113) that it was not "typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." Such reports, he continued, are "unlike payrolls, accounts receivable, accounts payable, bills of lading and the like" (p. 114). If admitted, he concluded, the "probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. * * * We cannot so completely empty the words of the Act of their historic meaning" (pp. 113–114).

Another landmark case arising under the Federal

---

[5] 28 U.S.C. (1946 ed.) 695 read as follows:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

Business Records Act is *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (C.A.D.C.), a case of particular interest because it involved memoranda prepared by a disinterested listener (a doctor) on the basis of oral interviews with a patient. The suit was one for recovery under a double-indemnity clause of a life insurance policy, and the issue was whether the insured had died as a result of an accident or had committed suicide. While a hospital patient, he had been killed by a fall down a stair well which was protected by a railing. The fall occurred at night and there were no witnesses to the event. One of the errors claimed by the defendant insurer in its appeal from a judgment of double indemnity was the exclusion by the trial court of various hospital records. These included a report of consultation with the hospital psychiatrist, attributing to the insured statements that he wished to die. Holding the various records inadmissible, the court stated (p. 300):

> In this case the records are not offered to prove routine facts such as the date of admission to the hospital, the names of the attending physicians, etc. They are offered to prove *the truth of accounts of events* and of complicated medical and psychiatric diagnoses. The accuracy of such accounts is affected by bias, judgment, and memory; they are not the routine product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for "payrolls, accounts receivable, accounts payable, bills of lading and the like." [Emphasis added.]

It observed further (p. 306):

> * * * it is not the absence of a motive to misrepresent which is the basis of the Shop Book exception to the hearsay rule. Purely clerical entries come within the rule regardless of the fact that the party making them has an interest in what they may be used to prove. Conversely where the accuracy of the entries depends on opinion, conjecture or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally relevant, the entries are not within the Rule regardless of motive.

Even more closely in point is *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314, 325 (C.A.D.C.), where the court said:

> * * * Is the Party entitled to production, for impeachment purposes, of written accounts made by a third party? Would Budenz be impeached if it were shown that a third party—not presented—had written that he (Budenz) had said so-and-so? We think he would not. Such reports would not be admissible unless the author was put on the stand and subjected to cross-examination. This is a classic situation requiring application of the hearsay rule. The reports, if there are any, are statements made by an unidentified third person purporting to show what a witness had said or done. The hearsay rule applies to writings. * * *

See, also, *Papworth* v. *United States*, 256 F. 2d 125, 129–130 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Palermo*, 258 F. 2d 397, 399 (C.A. 2), No. 471, this Term, pending on writ of certiorari; *United States* v. *Grunewald*, 162 F. Supp.

621, 624–625 (S.D.N.Y.) ("obviously, a witness cannot be impeached unless the prior statement is his statement"); *United States* v. *Anderson*, 154 F. Supp. 374, 375 (E.D. Mo.) (*supra*, p. 37) (construing the *Jencks* decision as prohibiting the production of reports containing "the subjective impressions, opinions or conclusions of the [recorder]"); cf. *United States* v. *Benson*, 20 F.R.D. 602, 604–605 (S.D.N.Y.).

It might be argued that the courts could have adopted a more liberal rule in the above cases. Indeed, there is respectable authority in the jurisprudence of other countries for the view that hearsay should not be excluded at all. But the problem here is not one of evaluating the advantages and disadvantages of the variant rules which the courts might evolve in the absence of legislation. The question is whether the statute enacted by Congress violates due process, whether Congress' solution of the problem is so irrational and arbitrary that it is constitutionally forbidden. We fail to see how it can be reasonably contended that Congress exceeded its constitutional powers when it said that there is no right to obtain, for purposes of impeachment, material which the courts of England and America have traditionally treated as unreliable hearsay.[9]

---

[9] Even where the document was not a work product and was not inherently unreliable, there was no common law right enabling the accused to obtain documents from the prosecution. See the discussion in *Gordon* v. *United States*, 344 U.S. 414, 418.

2. *The distinction finds support in the Jencks decision itself.*

As noted earlier (*supra,* pp. 32, 34), the reports involved in *Jencks* were treated by the Court as constituting statements fully and directly attributable to the witness himself—as either his own written statements or their equivalent. Thus, the Court declared (353 U.S. at 667):

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Precisely because the subtle variations to which the Court referred are considered a basis for impeachment, it becomes important that the statement be that of the witness and not that of the investigator. The omission of the facts related at the trial, the contrast in emphasis, the difference in order of treatment—these are all variations that could as easily stem from the investigator as from the witness. A summary by an investigator can reasonably be expected to highlight and pinpoint that information which the investigator deems of importance at that particular moment in the course of the investigation. He may relegate to secondary position or omit entirely in-

formation which he then thinks irrelevant or unimportant, but which may become significant later, perhaps in another context. The report may also contain personal views and impressions of the recorder. Even when these are not explicit, the recorder's prior knowledge of the witness and of the investigation in progress may be consciously or unconsciously reflected in his summary of the interview. Any delay between interview and recording necessarily injects another substantial element of doubt. This Court has recognized the "grave dangers of inaccuracy and untrustworthiness" of a non-contemporaneous account of a witness's oral statement. *Hickman* v. *Taylor,* 329 U.S. 495, 513. In short, a summary by an investigator, particularly one written some time after the interview, must always to some degree represent the joint product of the minds of the witness and of the investigator.

For this reason, a summary by an investigator does not even begin to have reliable impeaching value, particularly in relation to the nuances of which this Court spoke in *Jencks,* until it can be determined what detail and what emphasis is attributable to the witness and what to the investigator. The aim of impeachment, through the use of prior self-contradictory statements, is to place the prior statement of the witness against his present trial testimony so that the jury may "perceive that both cannot be correct * * * [and] therefore [conclude that the witness] shows a capacity to err." III *Wigmore, Evidence* (3d ed. 1940), Sections 1017, 1018. To show this, particularly on the basis of subtle or selective varia-

tions, the statement should be fully, directly and reliably attributable to the witness. At the least, Congress could rationally reach that conclusion.

3. To permit production of summaries would create difficult trial problems in relation to matters collateral to the main issues of the case and make for confusion and delay

As argued immediately above (*supra*, pp. 56–58), an investigator's summary of a witness's oral statement does not begin to have reliable value for impeachment purposes until it can be shown what is attributable to the witness and what to the investigator. But any attempt to settle such issues could transform a trial on the issue of guilt into a trial on the issue of authorship of the statement. The Congressional distinction, requiring production only of statements truly attributable to the witness, protects against the danger that the trial will degenerate into a battle on such collateral issues.

What would occur if investigators' notes, reports, summaries and work papers were made subject to inspection by the accused? The trial judge would be immediately faced with the enormously difficult task of attempting to separate that portion which seems on the face of the document attributable to the witness from that which represents the subjective impressions of the recorder. Unless the recorder specifically noted the exact points at which he inserted his own impressions, surely no stranger to the interview could pinpoint them with certainty, particularly where they consist of subtle variations in tone and emphasis, and not purposeful interpretations or alterations. But suppose that the trial judge somehow essayed a deter-

mination as to what portions of the report could be deemed a pure reflection of the witness's words. If the witness then denied that the expurgated version of the summary represented what he originally told the agent, should he nonetheless be bound by it? Would counsel be allowed to challenge the witness's disavowal by intensive time-consuming cross-examination? Would he be permitted to offer the recorder's testimony in an effort to resolve the issue? And if that procedure were allowed, would it follow that the recorder's memory as to what the witness told him, some time in the past, would be more trustworthy than the witness's recollection?

The end result would be a collateral and complicating trial of the witness, one subjecting him to the kind of harassment, annoyance, and confusion which it is the duty of the trial judge to avoid, *Alford* v. *United States*, 282 U.S. 687, 694. Such a "trial" would lack the concomitant benefits that may be derived from an intensive examination on the crucial issues in a case. Congress certainly did not act irrationally when it sought to avoid the kind of collateral by-play condemned by Mr. Justice Jackson in *Hickman* v. *Taylor*, 329 U.S. 495, 517 (concurring opinion), where he observed:

> Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer

> had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. * * *

The Congressional limitation therefore is grounded upon a valid policy consideration—the same general consideration of policy which underlies various judicially developed limitations upon cross-examination and impeachment: reduction of trial complexity and confusion. To illustrate, a witness called to attest to the good character of the defendant or of another witness is permitted to testify only in general terms as to general reputation for truth and veracity. Such opinion-hearsay is permitted, rather than direct testimony as to specific traits of character, because the latter type of investigation, though assuredly relevant, "would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation." *Michelson* v. *United States*, 335 U.S. 469, 478. It is also settled that an inquiring party is bound by a witness's answer when the inquiry relates to a matter collateral to the issues in litigation. Despite the nature of the witness's response, no extrinsic evidence or additional witnesses may be called. This is true where a witness is questioned concerning specific acts of misconduct not amounting to a conviction for a felony, or where he is questioned con-

cerning an alleged prior contradiction material to his testimony, but collateral to the case. See, *e.g.*, *Ewing* v. *United States*, 135 F. 2d 633 (C.A.D.C.), certiorari denied, 318 U.S. 776; *United States* v. *Sager*, 49 F. 2d 725, 730 (C.A. 2); *Pullman Co.* v. *Hall*, 55 F. 2d 139, 141 (C.A. 4); *Simon* v. *United States*, 123 F. 2d 80, 85 (C.A. 4), certiorari denied, 314 U.S. 694; *Coulston* v. *United States*, 51 F. 2d 178 (C.A. 10). The rationale sustaining these limitations is that cross-examination and impeachment must not be allowed to become the means for sidetracking and delaying the trial on issues collateral to the main cause. Certainly, Congress could rationally proceed on the same premise.

II. The Court of Appeals properly considered the nature of the document in determining whether it should reverse and order a new trial

Petitioners argue broadly that the Court of Appeals could not go outside the certified record in order to determine whether the Carlin report was subject to discovery under 18 U.S.C. 3500. They contend further that they were deprived of their rights because the determination was made *in camera*. Petitioner in No. 437 also argues that 18 U.S.C. 3500 should not have been considered in determining whether there was reversible error, because the trial antedated the statute.

A. Petitioners' broad challenge disregards the function of the appellate court, which is to decide whether a conviction should be set aside because of substantial error at a trial. This was a case in which the jury found defendants guilty on the basis of overwhelming

evidence. To be sure, any serious defect in procedure might nonetheless require a new trial. But if the claimed error in procedure was found to rest on an *assumption* of fact (*i.e.*, that the statement was the witness' own) which was indisputably erroneous, there would be no occasion for reversal and for a second protracted trial. The Court of Appeals had the power to consider whether the claimed controversy did in fact exist and, to that end, the right to examine the Carlin report. The procedure followed derives from the same rationale which permits an appellate court to go outside the record on appeal in order to determine whether a controversy is moot or whether a justiciable issue is before it. This Court has recognized the validity of that practice on numerous occasions. See, *e.g.*, *American Book Company* v. *Kansas*, 193 U.S. 49, 52; *Kimball* v. *Kimball*, 174 U.S. 158, 162; *Mills* v. *Green*, 159 U.S. 651, 653; *Doremus* v. *Board of Education*, 342 U.S. 429, 431. Similarly, an appellate tribunal may consider material outside the record which establishes that an apparent controversy is in reality no case or controversy because the suit is a collusive one. *United States* v. *Johnson*, 319 U.S. 302, 305. In short, the court may consider matters outside the record to determine whether a controversy does in fact exist.[10]

---

[10] *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905, relied upon by petitioner in No. 155, is inapposite. In that case, after an *in camera* inspection of the witness's statement, the trial judge found that it did not relate to his trial testimony and that there was nothing inconsistent between it and such testimony. The parties stipulated to exclude the statement from the record on appeal. The Second

B. Petitioners argue that, at the least, they should have had a *voir dire* hearing to determine how and when the document was prepared.[7]

To decide what procedures were appropriate requires, at the threshold, a consideration of the statutory standard governing production. In our view, the statutory definition of the term "statement" is so explicit and its application to this case so clear that there was no occasion whatever for the Court of Appeals to conduct an adversary proceeding in order to determine whether the Carlin report was subject to discovery.

To be subject to production, the statement had to be an actual recording by stenographic, electrical or equivalent method. It not only had to be "substantially verbatim"; it also had to be "recorded contemporaneously." The words "substantially verbatim" take care of the situation where an inter-

---

Circuit held that it was bound by the stipulation and could not independently examine the statement. On this view, it could not determine whether the trial judge's failure to follow the procedures thereafter prescribed in 18 U.S.C. 3500(c) (procedures for determining which portions of statement should be excised and which turned over) had prejudiced the defendant. Such a ruling is far removed from the instant problem. Here the court, not bound by any stipulation of parties, went outside the record for the sole purpose of determining the real fact—*i.e.*, whether the Carlin report was a statement of the witness within the reach of the statute.

[7] A similar contention is made by petitioner Rosenberg in No. 451. In that case, the trial court inspected documents in order to determine whether they were statements relating to the subject matter of the witness's testimony. Constitutional objections to the court's making such a preliminary determination are discussed in our brief in the *Rosenberg* case, pp. 12-62.

viewer writes in longhand what the witness is saying. Such a transcription may be less than perfect—almost invariably, it would involve some slight curtailment or modification of the oral phrasing. But, as we view it, the statute cannot be stretched to cover an investigative summary or a narrative report prepared subsequent to the interview. See, also, the discussion of the legislative history, pp. 38–48, *supra*. Such a report is neither substantially verbatim nor contemporaneous. Its preparation necessarily depends upon the recollection and interpretations of the interviewer.[12]

Did the Court of Appeals have an adequate basis for concluding that the Carlin report was such a summary or a narrative account, and not a substantially verbatim transcription contemporaneously made? The court had the statement of the prosecutor that he did not have in his possession a transcript of any statement by the witness. It had the affidavit of the Senate investigator who interviewed the witness, stating how the report had been prepared. Finally, it had the plain internal evidence provided by the report itself. In these circumstances, we submit, the court could certainly make the determination that the document would not be one subject to discovery at a new trial.

It is, of course, a customary function of courts to make preliminary determinations as to the production of documents and the admission of evidence. As we argue in our brief in *Rosenberg*, No. 451, pp. 42–62,

[12] To the extent that the decision in *United States* v. *Waldman*, 159 F. Supp. 747 (D.N.J.), assumes that such a report might come within the statute, we believe it untenable.

in which this problem is treated more extensively, it was proper for Congress to provide, as it has in 18 U.S.C. 3500(c), that the trial court may examine documents *in camera* to determine whether they relate to the subject matter of the witness's testimony, and no less proper for the court to determine whether a document is of a kind which Congress has made subject to a motion for discovery. One cannot reasonably attribute to Congress a purpose to allow the defendant to see initially that which Congress has plainly provided he shall not see at all.

C. Petitioner in No. 437 argues (Pet. Br. 39–43) that, since the offense was committed and the trial conducted before the enactment of 18 U.S.C. 3500, consideration of the impact of that statute in determining whether the failure to produce was reversible error violates the constitutional prohibition of *ex post facto* legislation. This contention has been consistently rejected by the lower federal courts. *United States* v. *Papworth*, 156 F. Supp. 842, 851–852 (N.D. Tex.), affirmed, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Miller*, 248 F. 2d 163, 165 (C.A. 2), certiorari denied, 355 U.S. 905; *United States* v. *Gandia*, 255 F. 2d 454 (C.A. 2); *Lohman* v. *United States*, 251 F. 2d 951 (C.A. 6); *Bergman* v. *United States*, 253 F. 2d 933, 935 (C.A. 6); *United States* v. *Angelet*, 255 F. 2d 383, 384 (C.A. 2).

As we have already suggested (*supra*, pp. 32–35), and as we argue at greater length below (*infra*, pp. 68–70), we believe that the failure to require production of Carlin's report was not error under the decision in *Jencks* v. *United States*, 353 U.S. 657. But even assuming

otherwise, the Court of Appeals did not err in taking cognizance of the law as it existed at the time of its decision.

As this Court observed in *Beazell* v. *Ohio*, 269 U.S. 167, 170, a case holding that a statute authorizing joint trials for jointly indicated persons was not *ex post facto* as applied to prior crimes: "[T]here may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition" [but it is] "now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited."

The kind of substantial change affecting basic rights which comes within the constitutional prohibition is illustrated by *Kring* v. *Missouri*, 107 U.S. 221, where a Missouri statute which permitted conviction for a greater offense (first degree murder), despite reversal of a conviction on a lesser offense (2nd degree murder), was held invalid as applied to a crime committed at a time when conviction of second-degree murder was held to be an acquittal on the charge of murder in the first degree. As later observed by the Court in *Thompson* v. *Missouri*, 171 U.S. 380, 383, 384, the statute held invalid in *Kring* "* * * was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that pro-

tection against punishment for murder in the first degree which was given him at the time of the commission of the offence. The right to such protection was deemed a substantial one—indeed, it constituted a complete *defence* against the charge of murder in the first degree—that could not be taken from the accused by subsequent legislation."

On the other hand, a statute which enlarged the class of persons who could be witnesses at a trial to include those previously convicted of a felony (*Hopt* v. *Utah*, 110 U.S. 574, 581) and one which permitted the admission of documentary evidence excludable at the time of the offense (*Thompson* v. *Missouri*, 171 U.S. 380, 382) were upheld against the *ex post facto* challenge. This result was reached in the *Hopt* case despite the fact that the testimony of the felon "tended to implicate the defendant in the crime charged against him" (110 U.S. at 587).[13]

Here, the court has held merely that the statute would bar petitioners' *inspection* of a Government work product, sought for possible use on cross-examination conducted with a view to impeachment. The petitioners are not deprived of a defense and the consequence is neither harsh nor arbitrary.[14]

---

[13] See, also, *Gibson* v. *Mississippi*, 162 U.S. 565, 589 (change in qualifications for grand and petit jurors); *Duncan* v. *Missouri*, 152 U.S. 377, 382 (change in organization of State Supreme Court); *Mallett* v. *North Carolina*, 181 U.S. 589, 593–597 (enlarging State's right of appeal).

[14] A comparable issue of *ex post facto* application of the "Jencks" Act is discussed in the Brief for the United States in *Scales* v. *United States*, No. 488, at pp. 110–112.

III. Denial of the request for production would not have been error under *Jencks* v. *United States*, 353 U.S. 657

Petitioners' entire argument is based on the premise that the failure to turn over the Senate investigator's report of his interview with Carlin would have been error under the decision in *Jencks* v. *United States*, 353 U.S. 657, if it were not for the intervening enactment of the statute. As we have already indicated (*supra*, pp. 32–35), we think this is an unwarranted assumption.

The *Jencks* case did not purport to decide that all out-of-court statements made by, or somehow connected with, a prosecution witness, and all accounts or versions of such statements, are discoverable at the instance of the defendant. Like any other decision, *Jencks* must be examined against the background of its salient facts. One must then ask how the facts in *Jencks* compare in significant respects with the facts of the present case.

First. In *Jencks*, the Court was dealing with statements made by two Government witnesses who were crucial to the case and who had been paid to make reports.

Here, as we point out *infra* (pp. 70 *ff*), the witness Carlin was not a principal figure in the trial. Moreover, he was not a paid informant but an ordinary employee of one of the companies involved in the alleged illegal practices.

Second. In *Jencks*, the extra-judicial statements of the two witnesses were closely contemporaneous with the events recounted therein. In ruling that the statements should be made available, the Court stressed

"the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory" (353 U.S. at 667). Indeed, the actual holding of the case is limited to statements contemporaneous with the events described.

Here, the interview which led to the Carlin report took place some three years after the events in question.

Third. In *Jencks,* the court was dealing with statements which it regarded as the witnesses' own statements. See *supra,* pp. 32–34.

Here, the controversy relates to an interviewer's report. We are thus concerned with a type of "record" which is characteristically permeated by subjective impressions, opinions and interpretations, and which necessarily involves selection and synthesis.

Fourth. In *Jencks,* there was no efficacious means, other than the witnesses' prior statements, to determine what variations (if any) there were as between the witnesses' original accounts and their later trial testimony.

In the instant case, Carlin, following his interview with a Senate investigator, was examined at length before a Senate committee. The verbatim transcript of this prior sworn testimony was not only available to the defense, but was used by the defense on cross-examination.[15]

---

[15] In addition, the summary was by a Senate investigator, not an agent in the executive branch; and the summary was not in the possession of the prosecutor when demand was made at the trial (*supra,* p. 18). However, we do not rest too heavily on these differentiating factors since the government did procure the Senate investigators' report and make it available to the Court of Appeals.

On the basis of these significant differences, we submit that the *Jencks* decision would not have required an order of production in the instant case.

IV. Any possible error in failing to order production of the summary of Carlin's interview had no effect whatever as to Wool and Lev and was harmless as to Rubin

A. Carlin did not implicate Wool and Lev, and the substance of his testimony as to Rubin was conclusively established by independent evidence, including Rubin's own testimony

Only petitioner Rubin moved for the production of the report of Carlin's statement to the investigator (R. 46). The failure of petitioners Lev and Wool to do so is readily understandable, for Carlin's testimony had no bearing on the case against them.

Carlin was an accountant for Bonita. Apart from identification of company records, his testimony was principally concerned with the early meetings which culminated in the decision of the company officers to avail themselves of Rubin's services. He gave no testimony at all concerning the "white hat" aspect of the conspiracy, which was the only aspect submitted to the jury in relation to Lev (Tr. 4053–4054, 4085, 4167–4169) and was the principal aspect so far as Wool was concerned. Even as to the "cap" contract, Carlin's testimony related very largely to events which occurred before Wool entered the picture and it did not implicate Wool. Counsel for Lev elicited from Carlin, on cross-examination, that Lev had nothing to do with the transactions which the witness described (R. 41). Counsel for Wool did not trouble to cross-examine (R. 64). *Supra,* pp. 16, 17.

Carlin's testimony was not significant in relation to Rubin. The fact that there were meetings

culminating in Bonita's decision to use Rubin's services as a means of procuring government contracts was not challenged. Rubin himself testified to this (Tr. 1928 *et seq.*, 1940–1941), as did Ades and Levy. There was no question but that Rubin made assurances, as Carlin testified, that he could "get" and "handle" the contracts (R. 26, 28, 31). Levy and Ades confirmed this (see Tr. 408, 3194). Rubin himself admitted that he told Bonita officers that he felt confident that he could get a bid (Tr. 1937); that he brought samples and the invitation to bid to the company officers (Tr. 1945); and that he later arranged for deviations from contract requirements (Tr. 1959–1960). He admitted that he knew Major Farnell (then the contracting officer) (Tr. 1950) and that he gave assurance that he knew his "way around" (Tr. 1937). The only testimony by Carlin which could possibly be said to conflict with Rubin's own testimony was Carlin's evidence that Rubin stated he would need expense money to return favors extended by government personnel (R. 30). But Levy testified unequivocally as to Rubin's expressed need to entertain and buy presents for the people on 16th Street (*i.e.*, the government employees) (Tr. 412). Rubin's co-defendant Ades reluctantly described this as expenses for "travel and entertainment" (Tr. 3196). Rubin himself said his request was for travel, or "if I had to take people to lunch, or anything involved with the business, expense-wise" (Tr. 1936). Carlin's testimony on this subject was cumulative.

Rubin's counsel inquired if Carlin had told the Senate investigators that it was he who had posted a

thousand dollar check to "Entertainment"—an entry which Carlin had testified he made after talking to Rubin and Levy (R. 48–49). If counsel intended by this inquiry to question Carlin's assertion that Rubin instructed him as to how to post the check, the query was unimportant. The company bookkeeper testified that Rubin gave the instructions as to how to charge checks made to cash, and that when she cashed them she gave the money to him (Tr. 1075, 1076). It was Levy who testified that Rubin said this particular check was needed to reward government personnel and that Rubin suggested that such payments be charged to "travel and entertainment" on the company books (Tr. 432–433). Moreover, any issue as to the credibility of Levy's testimony in relation to this one entry could not have been determinative in the face of the overwhelming evidence of Rubin's dispensations of money and gratuities likewise charged to "Entertainment."

The testimony of Levy ("devastating", in the words of the court below (R. 85)) developed the government's case in this respect in minute detail (Tr. 396-670; Statement, *supra*, pp. 7 *ff*). He told how he had come into a financially faltering business enterprise, bringing with him all his available funds (Tr. 399-400). He told how he and the other Bonita officers were encouraged by Rubin's assurances that he could obtain for them government business by influencing or bribing government personnel (Tr. 407–413, 416). Refreshing his recollection with corroborating company records and his own notations, Levy described how the proceeds of company checks, noted and charged in odd

amounts to "travel" or "entertainment", were turned over to Rubin to make cash payments to Wool and others at the procurement office (Tr. 439, 486, 504, 525, 528, 538, 541). He told of Wool's frequent visits to the company offices—at times to pick up gifts of clothing from Rubin (Tr. 550–552)—and of taking Rubin's advice that the company pay Wool's doctor bills because he (Wool) was helping it get more work (Tr. 543–544, 548, 560, 562). He told a similar story as to Mella Hort, a government contract administration clerk handling the Bonita account, who received from Rubin (at company expense) gifts of lingerie, a storm coat, and children's clothing (Tr. 460, 466, 469–470). Levy confirmed that the Bonita company paid bills for a deep-freeze and for meat to stock it, sent by Rubin to Porreca, chief inspector of the procurement agency (Tr. 511, 513), and he told how Porreca reassigned his subordinates at Rubin's pleasure (Tr. 444–445). He related Rubin's confidences regarding the white hat contract—how, after its award, Lev, alerted by Rubin, had come to New York from Chicago to give a disgruntled Wool $5,000 (Tr. 604–612) and how Lev, before its award, had plied Hort with money and clothing from Saks Fifth Avenue (Tr. 619–620).

Conclusive evidence was developed by the testimony of former government personnel, some of whom had succumbed to bribery; by Rubin's business and professional acquaintances; and by the trial and pre-trial admissions of the defendants themselves.

Rubin, testifying in his own defense, supplied some of the most damaging evidence at trial. He admitted his frequent social contacts with govern-

ment personnel assigned to the Bonita and white hat contracts (R. 1993, 1995, 2031–2032). He confirmed that he made gifts to Mella Hort (Tr. 2001, 2296). He admitted sending a freezer and meat to Porreca, the chief inspector, and taking Wool, the contract officer, to his doctor for treatment—in both cases instructing that the bills be sent to Bonita (Tr. 2002–2003; 2036–2039).[16] He identified a Christmas gift list, made out in his own handwriting, on which the names of government personnel appeared (Tr. 2382–2400). Behind Porreca's name was listed "freezer" (Tr. 2393); behind Wool's "$200 (money)" (Tr. 2394).

Rubin admitted asking Wool for the R & J contract (*supra*, p. 11), which he subsequently got (Tr. 2032, 2033). He confirmed that he arranged for deviations from contractual specifications (Tr. 1959, 1961, 1968, 1985–1989). He admitted that he asked Porreca to remove inspectors whom he did not like (Tr. 1970–1973, 2013, 2357), in one instance contacting a replacement himself (Tr. 1976).

Rubin admitted receiving various large checks from Bonita, offering the explanation that they were for services rendered although it appeared that he was

---

[16] Rubin's attempt to explain away these admissions was ludicrous. He said that he had the freezer bill sent to Bonita because Porreca's wife would complain about the expense of buying a freezer (Tr. 2003). The court reminded him that he had just testified that Porreca had told him that his wife thought it would be a good idea to get a deep-freeze (Tr. 2003). He indicated that Porreca had promised to reimburse him (Tr. 2003), a fact denied by Porreca (Tr. 2004). He admitted that he never was repaid by Porreca (Tr. 2005), or by Wool for the doctor's bill (Tr. 2041).

working on a percentage-of-profits basis; this money, he conceded, was not included as income in his tax reports (Tr. 2469–2482, 2491). His testimony confirmed and corroborated practically every detail of Levy's testimony as to the time and amount of gratuities and payments made to government personnel.

In addition, there was testimony of the former chief inspector of the procurement agency, Porreca, who confirmed that he received a deep-freeze, meat, and lingerie from Rubin (Tr. 1227–1233); that he had a subordinate, of whom Rubin had complained, transferred from the Bonita plant and replaced with another whom Rubin thought a "pretty good fellow" (Tr. 1214, 1221–1226). Porreca testified further that he made another such transfer with respect to Lev's white hat contract, again at Rubin's request (Tr. 1254), and subsequent to the time he had been handed, surreptitiously, a white envelope by Lev (an envelope containing a thousand dollars) (Tr. 1249–1253); that he expedited, at Rubin's request, the pre-award survey on Lev's white hat contract (Tr. 1242–1243); that when he mentioned the resulting report finding Lev's facilities adequate despite the lack of machinery and personnel, Rubin assured him that Wool was assisting them—was one "of the boys" (Tr. 1244–1245).

Other government personnel assigned to these contracts likewise testified to grave indiscretions committed at Rubin's request. One inspector verified that he had lived in Puerto Rico at Bonita's expense while performing his duties for the government (Tr. 1351–1352) and that he sent the defective hats he found to Rubin instead of his superiors (Tr. 1353).

A government accountant admitted that he went to Puerto Rico under an assumed name for a small fee, and at Bonita's expense, to perform a service for the company (Tr. 1159–1171). The contract administration clerk, Mella Hort, who handled and granted Bonita's requests for deviations from contract requirements, admitted that she received gifts from Rubin—a storm coat and lingerie for herself, and coats for her children (Tr. 3317, 3322, 3323). She also told of receiving two expensive suits from Lev, purchased at Saks Fifth Avenue, just prior to the award of the white hat contract (Tr. 3400–3401).

A lingerie manufacturer told of billing merchandise to Bonita (Tr. 1140); an executive of an appliance company told of sending a freezer to Porreca and billing Bonita (Tr. 1190). A doctor testified that Rubin brought Wool to him for treatment and that his bill, including services to Wool and Rubin, was paid by a check from Bonita (Tr. 1144, 1146). A company bookkeeper told of Rubin's social engagements with Wool and Mella Hort (Tr. 1075). Circumstantial evidence developed through the testimony of a banker, a hotel employee, a real estate dealer, and an alleged lender of money, provided persuasive evidence that Lev paid a large sum of money to Wool after the award of the white hat contract, a fact to which Levy had testified (Tr. 1132, 1411, 1417, 1487, 604–612).

In the face of all this evidence, Carlin's entire testimony could have been omitted without the slightest injury to the government's case. In those circumstances, we submit that it would be magnifying

a rule intended to do justice into the opposite to hold that it was reversible error to fail to obtain, from a Senate Committee, as to this secondary witness—who at most implicated only petitioner Rubin, largely on the basis of facts which Rubin admitted—a document which the witness had not seen, which the prosecutor did not then have, and which was not in the words of the witness but was merely a summary of what he had said three years after the events.

B. The rule of harmless error applies, in proper cases, to a failure to produce statements or reports of a witness

In *Jencks,* this Court stressed the crucial nature of the testimony of the witnesses Ford and Matusow. Not only were they the principal witnesses in a case proved entirely by circumstantial evidence, but their testimony was necessary to bridge a gap in the government's evidence—since the evidence established Jencks' membership in the Communist Party on April 28, 1950, the date on which he was alleged to have sworn falsely to the contrary, only by Ford's testimony that between October 1949 and August 1950 (the date when Matusow knew Jencks) the Communist Party took no disciplinary action against Jencks (see 353 U.S. at 660). Stressing the importance to the defendant of the impeachment of that testimony, and the value of the reports in doing so, the Court reversed. Even so, Justices Burton and Harlan, concurring in the result, did not believe that the failure to order production of the prior statements of these witnesses necessitated a new trial. They indicated that, except for other errors committed during trial, they would have remanded to

the trial court for a determination of whether, in the light of the whole record, non-production was prejudicial, saying (353 U.S. at 678):

> * * * If the reports contain material that the trial court finds has evidentiary value to petitioner, a new trial should be granted in order that petitioner may use it. But if the reports do not contain contradictory or exculpatory material helpful to petitioner, no possible prejudice could have resulted from the trial court's denials of petitioner's motions. * * *

We do not believe that the *Jencks* opinion stands for the proposition that never, under any circumstances, may the failure to produce as to any witness, no matter how inconsequential, be deemed non-prejudicial. Nor have the lower courts proceeded on that assumption. See *United States* v. *Sheba Bracelets,* 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904; *Simms* v. *United States,* 248 F. 2d 626, 629–630 (C.A.D.C.), certiorari denied *sub nom. Duncan* v. *United States,* 355 U.S. 875; *Padron* v. *United States,* 254 F. 2d 574, 576 (C.A. 5), certiorari denied, 358 U.S. 815; *United States* v. *Rosenberg,* 257 F. 2d 760 (C.A. 3), pending on writ of certiorari, No. 451, this Term; *Harris* v. *United States,* 261 F. 2d 792 (C.A. 9), petition for a writ of certiorari pending, No. 619, this Term.[17]

---

[17] In *Bergman* v. *United States*, 253 F. 2d 933 (C.A. 6), where the court did not have the prior statement before it, it declined to speculate as to whether the failure to turn over the document could be non-prejudicial in the circumstances of that case. But cf. *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905, discussed *supra*,

Rather, we think that the reasoning of both the majority and the concurring opinions in *Jencks* points up, with regard to production of documents, what is a truism in other areas: by its very nature harmless error is a problem which must be resolved on the particular facts of each particular case. As this Court said in *Kotteakos* v. *United States*, 328 U.S. 750, 761, the discrimination required in deciding whether an error is technical or substantial "is one of judgment transcending confinement by formula or precise rule." And further, at p. 762, "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the bal-

---

pp. 62–63 where the Second Circuit was unwilling to assume that prejudice resulted from failure to turn over a statement where the trial court had found that the statement did not relate to the testimony of the witness.

Some language in a recent "Jencks" Act decision of the Third Circuit, *United States* v. *Prince*, C.A. 3, No. 12,785, decided March 18, 1959, might be read as declaring that the rule of harmless error could never be applied in a case involving an erroneous failure to produce. But in that case the reports were those of a prime government witness and apparently related to crucial testimony at the trial; and the Third Circuit was probably holding that *in such circumstances* it would not canvass the record to see whether production of the report would conceivably have produced a different verdict. It is significant that the Third Circuit did not express disagreement with, or disapproval of, its earlier opinion in the *Rosenberg* case, No. 451, in which it did apply the rule of harmless error in a "Jencks" Act context (see R. in No. 451, R. 96).

ance for decision on the case as a whole, are material factors in judgment." In the light of all the evidence in this case, plus the other means available for testing Carlin's credibility, the failure to order production of a summary of a Senate investigator's interview with this secondary witness does not justify reversal of this conviction.

C. The ruling as to Carlin's testimony did not permeate the trial

Apparently realizing the unimportance of Carlin's testimony *per se,* petitioners Rubin and Wool attempt to give significance to the ruling on Carlin's testimony by asserting that, since Carlin was an early witness, the ruling must be assumed to have influenced their later conduct and kept them from making demands as to other witnesses. It is admitted that petitioners made no demand at the trial for these other documents which they now say were important. The contention that counsel could not, in view of the one ruling, have demanded production of other documents without risking prejudice to their clients is unconvincing. Counsel showed no such reluctance as to objections made to the admissibility of evidence; they reiterated, to a man, their positions with such frequency and perseverance as to prompt one counsel to refer to them as a "regular omnibus objection" (Tr. 474) and to cause the court to state at intervals that he would consider the objections made (see, *e.g.,* Tr. 441–442, 434–435, 481, 490–491, 500–500A, 502, 504, 509, 511, 526, 556).

This case was being tried in the Second Circuit which had what was considered, at the time, an advanced rule as to production. On some slight show-

ing of inconsistency, the trial judge was required to examine a prior statement by the witness to see if it might have impeaching value. *E.g., United States* v. *Krulewitch,* 145 F. 2d 76, 78 (C.A. 2); *United States* v. *Cohen,* 145 F. 2d 82, 92 (C.A. 2, certiorari denied, 323 U.S. 799–800; *United States* v. *Ebeling,* 146 F. 2d 254, 256 (C.A. 2). The trial judge had indicated, in ruling on Rubin's demand for production as to Carlin, that he would look at a document if there were "something that tends to make us believe that there was something inconsistent" in it (R. 74). To say that this ruling deterred or intimidated counsel from attempting to obtain other statements is an attempt to find some basis for asserting prejudice where none in fact exists. None of the petitioners established that any witness other than Carlin had given a written statement capable of being produced and, with one exception, the few inquiries made about interviews with investigators were not directed toward the showing of any inconsistency.

Thus, witness Levy was asked by counsel for Lev whether he told Balaban and Poole (the Senate investigators) that he would be glad to assist them—*i.e.,* to testify against Lev—or whether he had even mentioned the name of Lev. Levy replied in the negative. The matter was pursued no further (Tr. 683–684). Counsel for Rubin inquired whether Levy signed a statement for any law enforcement agency. He replied that he did with respect to the Senate. Asked if he signed a statement for Balaban and Poole, he said he did not remember but did remember speaking to them (Tr. 714–716). All this was asked,

counsel indicated, for the expressed purpose of showing that Levy must have known that he himself had violated the law (Tr. 717–718). Another reference to interviews with government investigators came during the cross-examination of Porreca, the Government's chief inspector, when counsel for Lev told the witness when he had been questioned by people connected with the Senate Committee, drew from him an admission that he had lied at that time, and at Senate executive hearings (Tr. 1268–1272), and then went on to question him at length about his recorded testimony before the full Committee at which time he admitted having lied before the executive committee (Tr. 1272, *et seq.*). Obviously, counsel could have had no further interest in this matter for impeachment purposes since the witness readily admitted that he had lied initially to investigators. In short, it is clear that petitioners were not too much concerned about seeing statements made to investigators. This is understandable since they had access to the testimony of the witnesses recorded at the Senate hearings—testimony which they used extensively for impeachment purposes (see, *e.g.*, R. 66, Tr. 678, 687, 702, 762, 778–779, 811, 844, 849, 894, 1063, 1101, 1118, 1184, 1273–1274, 1326–1327, 1433–1434).[18]

The question of Levy's Arabic notes, now made an issue by petitioner Rubin, was considered only at the pretrial hearing (P. Tr. 51–60). The United States Attorney then informed the court that there were such

[18] We re-emphasize that no demand was made for Senate testimony, if any, recorded in executive session.

notes in existence made by a prospective government witness; that they had been translated by an employee of the Library of Congress together with the witness who had recorded them; and that, because defense counsel had voiced some objection to the fact that the witness had helped in the translation (P. Tr. 51, 59), it was thought best that an independent translation be made. He indicated that he was having some difficulty locating a translator and that he intended to get an independent translation only of certain portions of the notes which he intended to use at the trial, not as evidence, but for the sole purpose of refreshing the recollection of the witness; that these portions would be available to the defense, but that he did not want to release the remaining portions which were not to be retranslated or used in any way. The court said that if it became apparent at the trial that these other portions, not to be independently translated, were important, the court would make a decision at that time as to whether they, too, should be made available to the defense. Counsel indicated that he "anticipated" that this would be the court's treatment of the matter at this time (P. Tr. 57), and that he understood "very clearly" that the problem would depend on the state of cross-examination at the trial (P. Tr. 59). At trial, no request was made by the defense to see any other portions of the notes. The issue of the production of the Arabic notes thus has no relation to the ruling on production of the report of Carlin's interview with the Senate investigator.

In sum, the denial of the request for production of the summary was insignificant in relation to the whole case and cannot be given some significance by a late attempt to connect it with other events at the trial. Petitioners were justly convicted on overwhelming evidence after a trial in which their rights were fully protected. There is no occasion for reversal of the conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
JEROME M. FEIT,
Attorneys.

APRIL 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959